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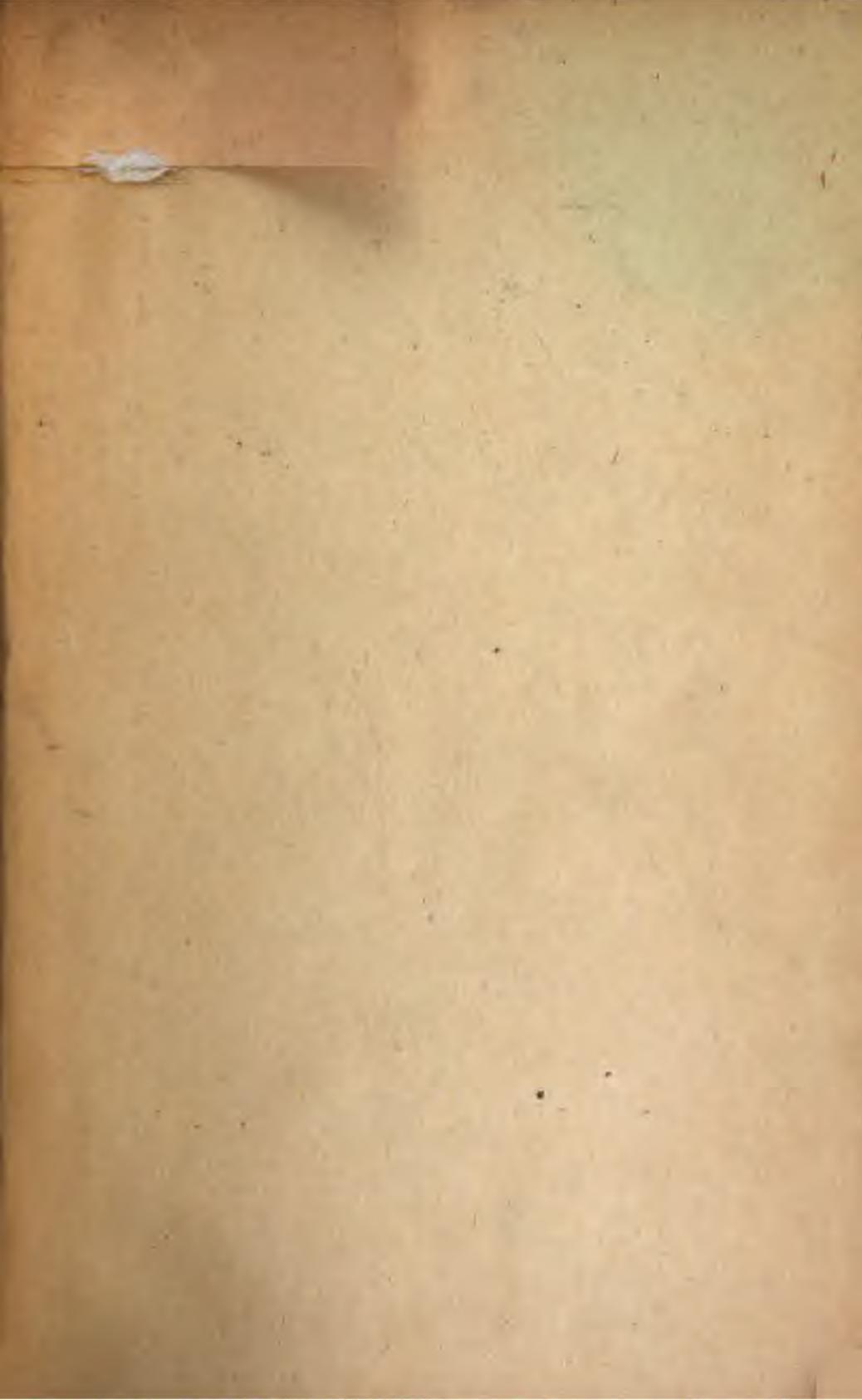
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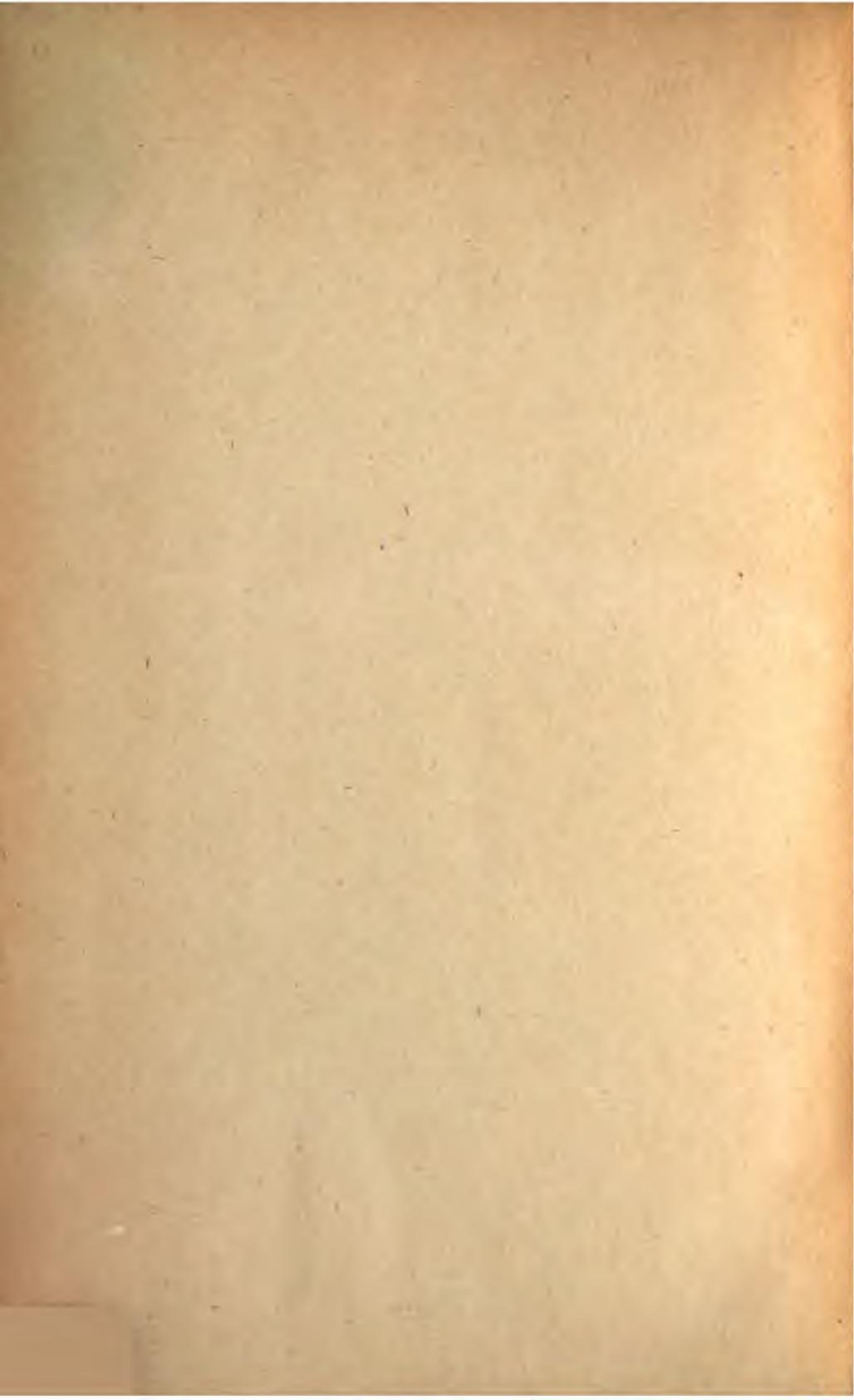
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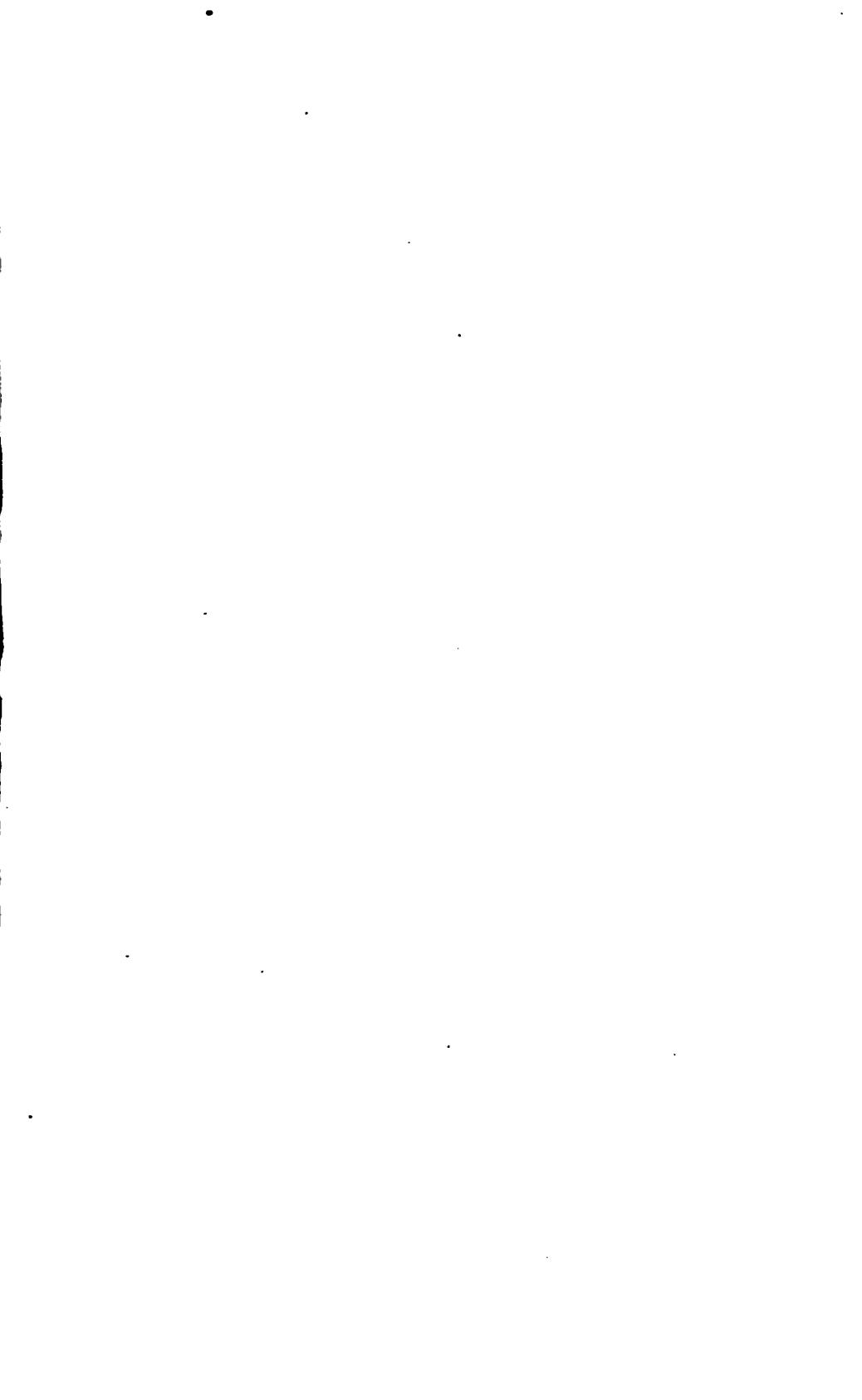
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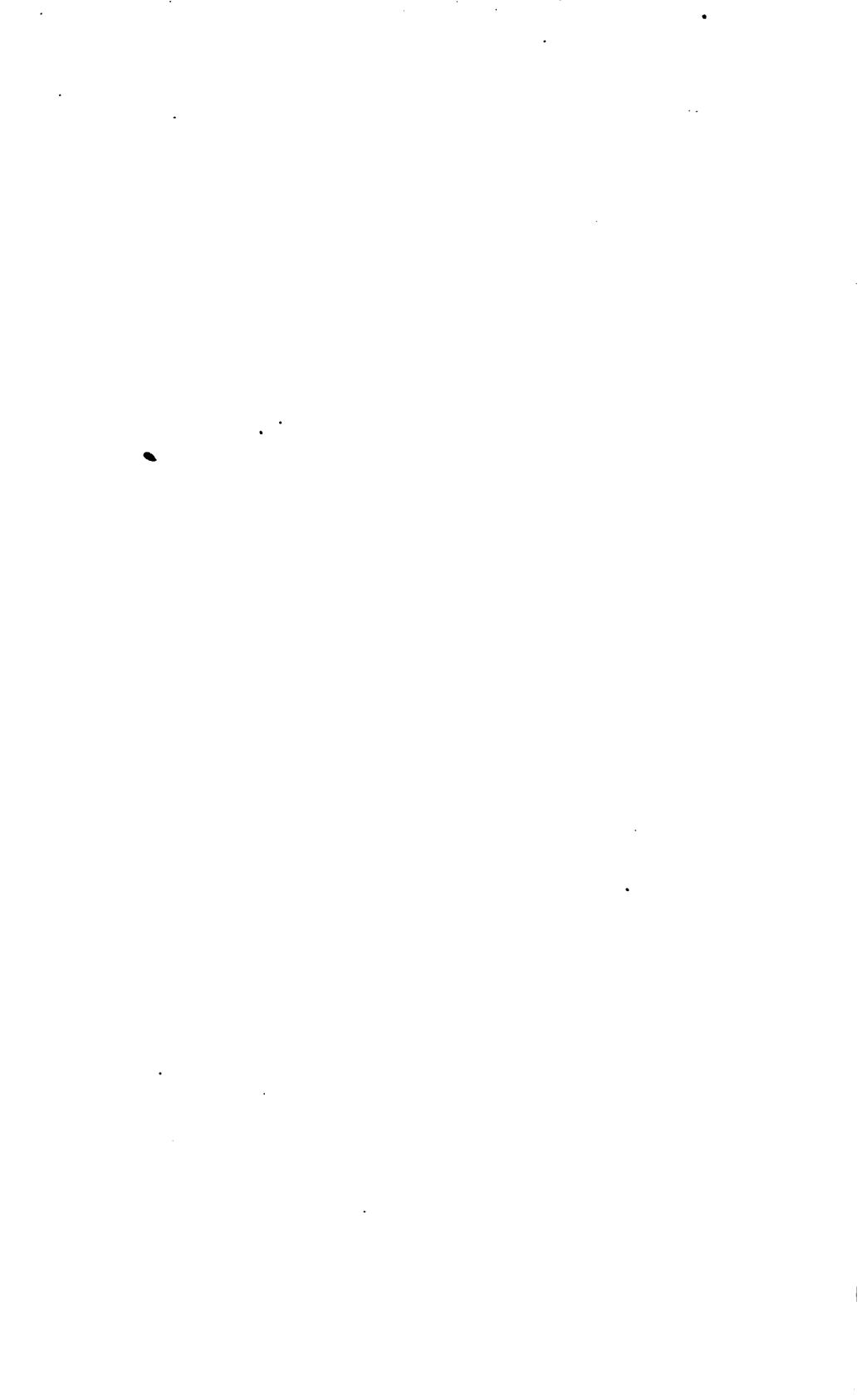
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# R E P O R T S

OR

## DECISIONS

IN

### THE SUPREME COURT

OF

### THE UNITED STATES.

WITH NOTES, AND A DIGEST.

BY B. R. CURTIS,

ONE OF THE ASSOCIATE JUSTICES OF THE COURT.

VOL. X.

SIXTH EDITION,

REVISED WITH REFERENCE TO THE LATEST DECISIONS.

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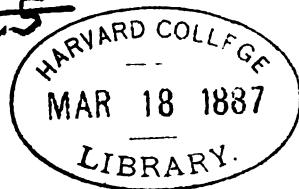
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## DECISIONS

OF THE

# SUPREME COURT OF THE UNITED STATES.

JANUARY TERM, 1832.

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JUDGES DURING THE TIME OF THESE REPORTS.

HON. JOHN MARSHALL, CHIEF JUSTICE.

HON. WILLIAM JOHNSON,<sup>1</sup>

HON. GABRIEL DUVALL,

HON. JOSEPH STORY,

HON. SMITH THOMPSON,

HON. JOHN MCLEAN, AND

HON. HENRY BALDWIN,

R. B. TANEY, Esq., ATTORNEY-GENERAL.

HENRY ASHTON, Esq., MARSHAL.

WILLIAM THOMAS CARROLL, Esq., CLERK.

} ASSOCIATE JUSTICES.

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GERRET SCHIMMELPENNICK AND ADRIAN TOR LAER, trading under  
the firm of R. and J. R. Van Staphorst, v. JOSIAH AND PHILIP  
TURNER.

6 P. 1.

In a writ of *capias*, by which an action was commenced, the two defendants were described as merchants, and surviving partners of a firm; in the first count of the declaration a promise by them, as surviving partners, was alleged; in the second count the promise declared on was by "the said defendants;" — *Held*, that evidence of a promise, made after the death of the deceased partner, was admissible under the second count.

\* The case is stated in the opinion of the court; but it [ \*2 ] should be added that in the circuit court the plaintiffs, on the 29th of April, 1825, sued out a writ of *capias ad respondendum*, in an

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<sup>1</sup> Mr. JUSTICE JOHNSON was prevented attending the court during the whole term, by severe and continued indisposition.

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Schimmelpennick v. Turner. 6 P.

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action of *assumpsit*, against "Josiah Turner, and Philip Turner, surviving partners of William Turner, citizens of Maryland, merchants."

*Stewart*, for the plaintiffs.

*N. Williams*, for the defendants.

[ \* 5 ] \* THOMPSON, J., delivered the opinion of the court.

This case comes up from the circuit court for the district of Maryland, upon a division of opinion in that court upon a point stated on the record in the following manner, namely: And thereupon the defendants, to maintain the issue on their part, gave in evidence to the jury, that William Turner, the person mentioned in the declaration in this cause, died on the 6th of January, 1819. That the said William was formerly a partner with the said Josiah and Philip, under the firm of Josiah Turner and Company, but that the said copartnership was dissolved in October, 1817, and that a new copartnership was formed between the said Josiah and Philip in 1820, under the firm of Josiah Turner and Company.

[ \* 6 ] \* opinion of the court, and their direction to the jury, that the plaintiffs are not entitled to recover, because the defendants are sued as surviving partners of William Turner, whereas the proof is, that William Turner had departed this life some months before the first transaction took place between the plaintiffs and defendants, and, therefore, could not constitute one of the firm of the defendants at any time during the transaction in question, and that, therefore, there is a variance between the contract declared on, and the contract given in evidence. Upon which prayer the opinions of the judges were opposed.

The declaration contains two counts. The first, setting out the cause of action, states as follows: for that whereas the said defendants, merchants and copartners, trading under the firm of Josiah Turner and Company, in the lifetime of said William, on the 1st day of March, in the year 1821, were indebted to the plaintiffs, &c., and being so indebted, the defendants undertook and promised to pay, &c. The second count is upon an *insimul computassent*, and begins: whereas also the said defendants afterwards, to wit: on the day and year aforesaid, accounted with the said plaintiffs, of and concerning divers other sums of money, due and owing from the said defendants, and then in arrear and unpaid, and being so found in arrear, the defendants promised to pay, &c.

Whatever objection may arise under the first count in the declara-

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Bank of the United States v. Bank of Washington. 6 P.

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tion, with respect to a variance between the contract, or cause of action, and the evidence to maintain it, that objection does not exist as to the second count. It is to be borne in mind that it forms no part of the question upon which the opinion of the judges was opposed, whether the evidence was admissible under the count upon an *insimul computassent*. The point of objection was that the cause of action as stated in the declaration arose against the defendants and William Turner, and the evidence only showed a cause of action against the two defendants unconnected with William Turner, and which arose since his decease.

The only allegation in the second count in the declaration, from which it is argued that the contract declared upon was one including William Turner with Josiah and Philip, is that the said defendants accounted with the plaintiffs, &c. But \*this [ \*7 ] does not warrant the conclusion drawn from it. The defendants were Josiah and Philip Turner. William Turner was not a defendant, and the reference by the terms the said defendants could not include him. It does not even describe the defendants as survivors, or allege that they accounted, as such, or in the lifetime of William Turner. But the whole cause of action, as set out in this count, arose against Josiah and Philip, entirely unconnected with William. The evidence, therefore, showing that William Turner died before the first transaction took place between the defendants and plaintiffs, did not show any variance between the contract declared upon in this count, and the contract proved. The one declared upon in the second count was between the plaintiffs and the defendants Josiah and Philip Turner, and the evidence did not show a contract varying from it.

We are accordingly of opinion that there was no variance between the contract declared upon in the second count, and the contract proved upon the trial, with respect to the parties thereto.

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**THE BANK OF THE UNITED STATES, Plaintiffs in Error, v. THE BANK OF WASHINGTON, Defendants in Error.**

6 P. 8.

An execution having regularly issued on an erroneous judgment was sent by one of the judgment creditors to the plaintiffs in error, to be collected for his account, with an indorsement thereon, "Use and benefit of the office of discount and deposit, U. S., Washington city. C. Neale." The plaintiffs in error received the amount, and when it was paid, the defendants in the judgment informed the agent of the plaintiffs in error they intended to appeal to the supreme court, and should expect the plaintiffs in error to refund. The judgment having been reversed — *Held*, the plaintiffs in error were not liable for the money thus collected.

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Bank of the United States v. Bank of Washington. 6 P.

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Though, after the reversal of an erroneous judgment, the defendant has a right to recover back what he may have paid, by a writ of restitution, or *scire facias*, or an action at law against the creditor, yet what is done under the execution pursuant to its precept is valid, and, so far as strangers or third persons are concerned, is final.

THE case is stated in the opinion of the court.

*Lear and Sergeant*, for the plaintiffs.

*Dunlap and Key*, contra.

[ \* 15 ] \* THOMPSON, J., delivered the opinion of the court.

This case comes up on a writ of error to the circuit court of the United States for the District of Columbia. The judgment in the court below was given upon a statement of facts agreed upon between the parties, substantially as follows:—

Triplet and Neale, in April, 1824, recovered a judgment against the Bank of Washington for \$881.18. A writ of error was prosecuted by the Bank of Washington, and that judgment was reversed by this court at the January term, 1828. 1 Pet. 25. But whilst that judgment was in full force, and before the allowance of the writ of error, Triplet and Neale, on the 30th of August, 1824, sued out an execution against the Bank of Washington, and inclosed it to Richard Smith, cashier of the office of discount and deposit of the Bank of the United States at Washington, with the following indorsement:—

Triplet and Neale v. The Bank of Washington.

"Use and benefit of the office of discount and deposit, United States, Washington city." Chr. Neale. "Pay to Mr. Brooke Mackall." Rd. Smith, cashier. "Received \$881.18." B. Mackall.

B. Mackall, who was the runner in the branch bank, presented the execution to the Bank of Washington, and received the amount due thereon, on the 9th of September, 1824. At the time of receiving the same, William A. Bradley, cashier of the Bank of Washington, verbally gave notice to said Mackall, that it was the intention of the Bank of Washington to appeal to the supreme court, and that the said office of discount and deposit would be expected, in case of reversal of the judgment, to refund the amount. Mackall paid the money over to Smith, who entered it to the credit of Neale, one of the plaintiffs in the execution. Before the execution was sent to Smith, Neale had promised him to appropriate the money expected to be recovered from the Bank of Washington, to reduce certain accommodation discounts, which he had running in the office of discount and deposit. Smith, when he received the execution with the

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Bank of the United States v. Bank of Washington. 6 P.

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indorsement thereon, understood and considered that it was for collection, and the money when received by him was deposited to Neale's credit generally, and he would have sent the money to him at Alexandria, if he had requested \* him to do so, or would [ \* 16 ] have paid his check for the amount. Immediately on the receipt of the money, Smith wrote to Neale informing him thereof, and asking him for specific directions how to apply it, which letter Neale immediately answered, giving him directions, and the money was applied according to such directions.

Upon this statement of facts, the court below gave judgment for the plaintiffs; to reverse which, the present writ of error has been brought.

That the Bank of Washington, on the reversal of the judgment of Triplett and Neale, is entitled to restitution in some form or manner, is not denied. The question is, whether recourse can be had to the Bank of the United States, under the circumstances stated in the case agreed. When the money was paid by the Bank of Washington, the judgment was in full force, and no writ of error allowed, or any measures whatever taken, which could operate as a *supersedeas* or stay of the execution. Whatever, therefore, was done under the execution, towards enforcing payment of the judgment, was done under authority of law. Had the marshal, instead of the runner of the bank, gone with the execution and received the money, or coerced payment, he would have been fully justified by authority of the execution; and no declaration or notice on the part of the Bank of Washington of an intention to appeal to the supreme court, would have rendered his proceedings illegal, or made him in any manner responsible to the defendants in the execution. Suppose it had become necessary for the marshal to sell some of the property of the bank to satisfy the execution, the purchaser would have acquired a good title under such sale, although the bank might have forbid the sale, accompanied by a declaration of an intention to bring a writ of error. This could not revoke the authority of the officer, and while that continued, whatever was done under the execution would be valid. It is a settled rule of law, that upon an erroneous judgment, if there be a regular execution, the party may justify under it until the judgment is reversed; for an erroneous judgment is the act of the court. 1 Stra. 509. 1 Ver. 195. If the marshal might have sold the property of the bank and given a good title to the purchaser, it is difficult to discover any good reason why a payment made by the bank should not \* be equally valid, as it respects [ \* 17 ] the rights of third persons. In neither case does the party against whom the erroneous judgment has been enforced, lose his

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remedy against the party to the judgment. On the reversal of the judgment, the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost. And the mode of proceeding to effect this object must be regulated according to circumstances. Sometimes it is done by a writ of restitution, without a *scire facias*, when the record shows the money has been paid, and there is a certainty as to what has been lost. In other cases, a *scire facias* may be necessary to ascertain what is to be restored. 2 Salk. 587, 588. Tidd's Prac. 936, 1137, 1138. And no doubt circumstances may exist where an action may be sustained to recover back the money. 6 Cowen, 297. But as it respects third persons, whatever has been done under the judgment whilst it remained in full force, is valid and binding. A contrary doctrine would be extremely inconvenient, and in a great measure tie up proceedings under a judgment, during the whole time within which a writ of error may be brought. If the bare notice or declaration of an intention to bring a writ of error will invalidate what is afterwards done, should the judgment at any future day be reversed, it would virtually, in many cases, amount to a stay of proceedings on the execution. No such rule is necessary for the protection of the rights of parties. The writ of error may be so taken out as to operate as a *supersedeas*. Or, if a proper case can be made for the interference of a court of chancery, the execution may be stayed by injunction.

It has been argued, however, on the part of the defendants in error, that the Bank of the United States stands in the character of assignees of the judgment, and is thereby subjected to the same responsibility as the original parties, Triplett and Neale.

Without entering into the inquiry whether this would vary the case, as to the responsibility of the plaintiff in error, the evidence does not warrant the conclusion that the Bank of the United States stands in the character of assignees of the judgment. There is neither the form nor the substance of an assignment of the [ \* 18 ] judgment. No reference whatever, either written or verbal, is made to it. The mere indorsement on the execution, "use and benefit of the office of discount and deposit of the United States, Washington city," cannot, in its utmost extent, be considered any thing more than an authority to receive the money, and apply it to the use of the party receiving it. It is no more an assignment of the judgment, than if the authority had been given by a power of attorney in any other manner, or by an order drawn on the Bank of Washington. The whole course of proceeding by the cashier of the office of discount and deposit, shows that he understood the in-

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dorsement on the execution merely as an authority to receive the money, subject to the order of Neale, with respect to the disposition to be made of it. He did not deal with it as an assignee, having full power and control over the money, but as an agent, subject to the order of his principal. He passed it to his credit on the proper books of the office, and wrote to him asking specific directions how the money should be applied. He received his directions and applied it accordingly, and all this was done six months before the allowance of the writ of error.

It is said, however, that although Mr. Smith might have considered himself a mere agent to collect the money, the Bank of Washington had no reason so to consider him. There is nothing in the case showing that the Bank of Washington had any information on the subject, except what was derived from the indorsement on the execution, and if that did not authorize such conclusion, the plaintiff in error is not to be prejudiced by such misapprehension. It was a construction given to a written instrument, and if that construction has been mistaken by the defendant in error, it is not the fault of the opposite party.

But again, it is said the payment of the money was accompanied with notice of an intention to appeal to the supreme court, and that, in case of reversal, it would be expected that the office of discount and deposit would refund the money.

If the plaintiff in error could be made responsible by any such notice, given even in the most direct and explicit manner, that which was given could not reasonably draw after it any such consequence. It is vague in its terms, and does not assert that the office of discount and deposit would be held responsible to refund the money, but only that it would be expected \*that it would be done. [ \* 19 ] This is not the language of one who was asserting a legal right, or laying the foundation for a legal remedy. And there is no evidence that even this was communicated to the office.

But the answer to the argument is, that no notice whatever could change the rights of the parties, so as to make the Bank of the United States responsible to refund the money. When the money was paid, there was a legal obligation on the part of the Bank of Washington to pay it, and a legal right on the part of Triplett and Neale to demand and receive it, or to enforce payment of it under the execution. And whatever was done under that execution, whilst the judgment was in full force, was valid and binding on the Bank of Washington, so far as the rights of strangers or third persons are concerned. The reversal of the judgment cannot have a retrospective operation, and make void that which was lawful when done.

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The reversal of the judgment gives a new right or cause of action against the parties to the judgment, and creates a legal obligation on their part to restore what the other party has lost, by reason of the erroneous judgment; and as between the parties to the judgment, there is all the privity necessary to sustain and enforce such right; but as to strangers there is no such privity; and if no legal right existed when the money was paid, to recover it back, no such right could be created by notice of an intention so to do. Where money is wrongfully and illegally exacted, it is received without any legal right or authority to receive it; and the law, at the very time of payment, creates the obligation to refund it. A notice of intention to recover back the money, does not, even in such cases, create the right to recover it back; that results from the illegal exaction of it, and the notice may serve to rebut the inference that it was a voluntary payment, or made through mistake.

The judgment must accordingly be reversed; and judgment entered for the defendant in the court below.

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THOMAS KIRKMAN, JR., Plaintiff, v. JOHN W. HAMILTON and others, Defendants.

6 P. 20.

Under the laws of North Carolina, adopted by Tennessee, an action of debt by an indorsee, will lie on a promissory note, and such an action of debt was not barred by any statute of limitations of Tennessee.

The payee of a note, at its date, was a citizen of the same State as the maker; subsequently, he became a citizen of another State, and then indorsed the note to a citizen of the latter State. *Held*, that the indorsee might sustain an action in the circuit court in his own name, the case not being within the exception in the 11th section of the Judiciary Act, (1 Stat. at Large, 78.)

THE case is stated in the opinion of the court.

*Webster*, for the plaintiff.

No counsel, *contrd.*

[ \*22 ] \* MARSHALL, C. J., delivered the opinion of the court.

This case comes up from the court of the United States for the seventh circuit, and district of West Tennessee, on a certificate that the judges of that court were divided in opinion on the following questions. 1. Whether the plea of the statute of limitations is a bar to the recovery of the plaintiff, on the second count in the declaration? 2. Whether an action of debt can be supported on the cause of action set forth in said second count? 3. Whether

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the averment of the citizenship of Thomas Ramsey and Co., the payees of the note in the said second count, is sufficient to sustain the jurisdiction of this \* court, under the provisions [ \* 23 ] of the 11th section of the Judiciary Act of 1789 ?

The second count is a declaration in debt on a promissory note executed by the defendants, made payable to Thomas Ramsey and Co., then citizens of Tennessee, and indorsed by them, after becoming citizens of Alabama, to the plaintiff, a citizen of Alabama, who instituted the suit as assignee of the said note.

The first question depends on an act of the State of North Carolina, passed in the year 1715, and was the law of Tennessee; the 8th section of which enacts "that all actions of trespass, detinue, actions sur trover and replevin for taking away of goods and chattels, all actions of account, and upon the case, all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding and imprisonment, or any of them, which shall be sued or brought at any time after the ratification of this act, shall be brought within the time and limitation in this act expressed, and not after; that is to say, actions of account render, actions upon the case, actions of debt for arrearages of rent, actions of detinue, replevin, and trespass, *quare clausum fregit*, within three years next after the ratification of this act, or within three years next after the cause of such action or suit, and not after."

This statute bars the particular actions it recites, and no others. It does not bar actions of debt generally, but those only which are brought for arrearages of rent. This is not brought for arrearages of rent, and is consequently not barred.

The action of debt, unless it be brought for arrearages of rent, not being within this statute, the court perceives no other which bars it. If the 7th section of the 31st chapter of the act of 1715 was even to be considered as adopting the act of limitations of the 4th of James I, it would not affect this case, because the suit was brought within the time allowed by that act.

The act of 1786, c. 4, was intended to make all bills, bonds, &c. negotiable, though under seal, and to enable the assignee to sue in his own name, and to bring an action on the case, notwithstanding the seal. The proviso of the 5th section, that "the act of limitations shall apply to all bonds, bills, and other securities hereafter executed, made transferable by this \* act, after [ \* 24 ] the assignment or indorsement thereof, in the same manner as it operates by law against promissory notes," cannot, we think, be fairly construed to extend the act of limitations in its operation on promissory notes.

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We are, therefore, of opinion, that the plea of the statute of limitations is not a bar to the recovery of the plaintiff, on the second count in his declaration.

The second question propounded is, whether an action of debt can be supported on the cause of action set forth in the second count?

The cause of action is a promissory note made by the defendants, and indorsed by the payees to the plaintiff.

In 1762, the legislature of North Carolina passed an act, c. 9, "for the more easy recovery of money due upon promissory notes, and to render such notes negotiable." The second section declares, that all such notes, payable to order, "may be assignable over in like manner as inland bills of exchange are by custom of merchants in England," and that the person or persons "to whom such money is, or shall be payable, may maintain an action for the same, as they might upon such bill of exchange," and the person or persons, "to whom such note so payable to order is assigned or indorsed, may maintain an action against the person or persons," &c. "who signed or shall sign such notes, or any who shall have indorsed the same, as in cases of inland bills of exchange." The note claimed in the second count of the declaration is payable to order.

In 1786, the legislature passed "an act to make the securities therein named negotiable," by which notes not expressed to be payable to order are placed on the same footing with those which are made so payable. The indorsee being thus entitled to sue in his own name, in like manner as on inland bills of exchange in England, the inquiry is, whether the indorsee of an inland bill of exchange may maintain an action of debt thereon in England.

This question was fully considered by this court in the case of *Raborg et al. v. Peyton*, reported in 2 Wheat. 385, which was an action of debt brought by the indorsee of a bill of exchange against the acceptor. The cases were reviewed in the opinion then given, and the court decided clearly, that, both on principle and authority, the action was maintainable.

[ \*25 ] \* We therefore think that an action of debt can be supported on the cause of action set forth in the second count.

The third question asks, "whether the averment of the citizenship of Thomas Ramsey and Co., the payees of the notes in the said second count, is sufficient to sustain the jurisdiction of this court under the provisions of the 11th section of the Judiciary Act of 1789?"

That section gives jurisdiction to the circuit courts of the United States, where "the suit is between a citizen of the State where the suit is brought, and a citizen of another State." This suit is brought

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Bank of the United States v. Green. 6 P.

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in the circuit court for the State of Tennessee, by a citizen of Alabama, against a citizen of Tennessee. It comes, therefore, within the very words of the section, and is within the jurisdiction of the court, unless taken out of it by the exception. The words of the exception, so far as they apply to the case, are, "nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory notes or other *chose in action* in favor of an assignee, unless a suit might have been prosecuted in such suit to recover the said contents, if no assignment had been made."

When this note was assigned, the payees, as is averred in the second count, had become citizens of Alabama, and might, consequently, have prosecuted a suit to recover the contents of the said note in the circuit court of the United States for Tennessee, if no assignment had been made. The averment of the citizenship of Thomas Ramsey and Co. in the said second count, is therefore sufficient to sustain the jurisdiction of that court, under the provisions of the 11th section of the Judiciary Act of 1789.

All which was ordered to be certified to the circuit court of the United States for the seventh circuit, and district of West Tennessee

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THE BANK OF THE UNITED STATES, Plaintiff, v. WILLIAM GREEN  
and others, Defendants.

6 P. 26.

This court has not jurisdiction under the act of April 29, 1802, § 6, (2 Stats. at Large 159,) upon a certificate of division respecting the marshal's poundage on an execution.

CERTIFICATE of division of opinion between the judges of the circuit court of the United States for the district of Ohio, concerning the right of the marshal to tax certain poundage on an execution.

*Doddridge*, for the marshal of the district of Ohio.

*Ewing*, contra.

\* MARSHALL, C. J., delivered the opinion of the court: [ \* 28 ] that the case was not within the jurisdiction of this court. The division of opinion was not upon any matter arising at the trial of the cause, but was upon a mere matter arising upon the service of the execution by the marshal; and was a mere question for the circuit court upon a collateral contest between the marshal and the bank, as to his right to fees. It was not, therefore, a case within the purview of the Judicial Act of 1802.

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THE UNITED STATES v. THE STATE BANK OF NORTH CAROLINA.

6 P. 29.

Under the act of March 3, 1797, (1 Stats. at Large, 512,) which is not controlled by the act of March 2, 1799, § 65, (1 Stats. at Large, 676,) the priority of the United States in case of a general assignment by their debtor, comprehends a bond for duties executed before the assignment, but payable afterwards.

THE case is stated in the opinion of the court.

*Townley*, (attorney-general,) for the United States.

*Peters*, contra.

*Story*, J., delivered the opinion of the court.

[ \*34 ] \* This case comes before the court upon a certificate of division of opinion of the judges of the circuit court for the district of North Carolina.

The suit is an information by the United States in the nature of a bill in equity, seeking to recover against the defendant, and Talcott Burr, as the assignee of William H. Lippett, the amount of custom-house bonds owing by Lippett to the United States; Lippett having become insolvent, and having made a voluntary assignment of all his property to Burr, for the benefit of his creditors, by which he

[ \*35 ] has given a preference of payment to certain creditors, who are made defendants; \*and, among others, to the State Bank of North Carolina, before payment to the United States. The bank of North Carolina appeared and plead a demurrer to the information; and, upon the argument of that demurrer, it occurred as a question, whether the priority to which the United States are entitled, in case of a general assignment made by the debtor of his estate for the payment of debts, comprehends a bond for the payment of duties executed anterior to the date of the assignment, but payable afterwards. Upon this question the judges were divided in opinion; and it now stands for the decision of this court.

The right of priority of payment of debts due to the government, is a prerogative of the crown well known to the common law. It is founded not so much upon any personal advantage to the sovereign, as upon motives of public policy, in order to secure an adequate revenue to sustain the public burdens and discharge the public debts. The claim of the United States, however, does not stand upon any sovereign prerogative, but is exclusively founded upon the actual provisions of their own statutes. The same policy, which governed

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in the case of the royal prerogative, may be clearly traced in these statutes; and as that policy has mainly a reference to the public good, there is no reason for giving to them a strict and narrow interpretation. Like all other statutes of this nature, they ought to receive a fair and reasonable interpretation, according to the just import of their terms.

The first enactment on this subject will be found in the Duty Collection Act of 4th of August, 1790, c. 62, § 45,<sup>1</sup> which provides that "where any bond for the payment of duties shall not be satisfied on the day it became due, the collector shall forthwith cause a prosecution to be commenced for the recovery of the money thereon by action or suit at law in the proper court having cognizance thereof. And in all cases of insolvency, or where the estate in the hands of the executors or administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States on any such bond shall be first satisfied." So that, in point of fact, the priority was first applied to bonds for the payment of duties, and to persons engaged in commerce; which disposes of that part of the argument of the defendant \*which has been [ \*36 ] founded upon a supposed policy of the government to favor merchant importers in preference to any other class of their debtors.

Then came the act of 3d March, 1797, c. 74, which extended the right of priority of the United States to other classes of debtors, and gave a definition of the term insolvency, in its application to the purposes of the act. It provides, § 5, "that, where any revenue or other officer, or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his debts shall make a voluntary assignment thereof, or in which the estate of an absconding, concealed, or absent debtor shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed." This act is still in force; and unless its application to the present case is intercepted by the act of 1799, c. 128, its terms would seem sufficiently broad to embrace it. The language is, where any person "becoming indebted to the United States by bond or otherwise," (which clearly includes a debtor upon a custom-house bond,) "shall become insolvent," (which is the pre-

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<sup>1</sup> 1 Stats. at Large, 169.

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dicament of Lippett,) "the debt due to the United States shall first be paid." What debt is here referred to? A debt which is then actually payable to the United States? Or a debt then arising to the United States, whether then payable, or payable only *in futuro*? We think the latter is the true construction of the term of the act. The whole difficulty arises from the different senses in which the term "due" is used. It is sometimes used to express the mere state of indebtedness, and then is an equivalent to owed, or owing. And it is sometimes used to express the fact that the debt has become payable.

Thus, in the latter sense, a bill or note is often said to be due, when the time for payment of it has arrived. In the former sense, a debt is often said to be due from a person, when he is the party owing it, or primarily bound to pay, whether the time of [ \* 37 ] payment has or has not arrived. This \* very clause of the act furnishes an apt illustration of this latter use of the term. It declares that the priority of the United States shall attach "where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased." Here the word "due" is plainly used as synonymous with owing. In the settlement of the estates of deceased persons, no distinction is ever taken between debts which are payable before or after their decease. The assets are equally bound for the payment of all debts. The insufficiency spoken of in the act, is an insufficiency not to pay a particular class of debts, but to pay all debts of every nature. Now, if the term "due," in reference to the debts of deceased persons, means owing, and includes all debts, whether payable *in præsenti* or not, it is difficult to perceive how a different meaning can be given to it, in regard to the debt of the United States, considering the connection in which it stands in the sequel of the same sentence. "Where the estate, &c., shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied." The obvious meaning is, that in case of a deficiency of assets, the debt owing to the United States shall be paid before the debts owing to the other creditors.

The only real doubt in the present case, arises from the phraseology of the 65th section of the act of the 2d of March, 1799, c. 128; which provides, that "where any bond for the payment of duties shall not be satisfied on the day it may become due, the collector shall forthwith, and without delay, cause a prosecution to be commenced for the recovery of the money thereon, in the proper court having cognizance thereof. And in all cases of insolvency, or where any estate in the hands of executors, administrators, or assignees, shall be insufficient to pay all the debts due from the deceased, the

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debt or debts due to the United States on any such bond or bonds, shall be first satisfied." The argument is, that the words "any such bond or bonds" refer to the bonds mentioned in the introductory part of the sentence; that is, to bonds for duties which have become payable, and are not paid. But we think that this construction is not necessary or unavoidable. The words "such bond or bonds" are fully satisfied by referring them as matter of description to bonds for the payment [ \* 38 ] of duties, whether then payable or not. The description is of a particular class of bonds, namely, for the payment of duties, and not of the accidental circumstance of their time of payment.

No reason can be perceived, why, in cases of a deficiency of assets of deceased persons, the legislature should make a distinction between bonds which should be payable at the time of their decease, and bonds which should become payable afterwards. The same public policy which would secure a priority of payment to the United States in one case, applies with equal force to the other; and an omission to provide for such priority in regard to bonds payable *in futuro*, would amount to an abandonment of all claims, except for a *pro rata* dividend. In cases of general assignments by debtors, there would be a still stronger reason against making a distinction between bonds then payable and bonds payable *in futuro*; for the debtor might, at his option, give any preferences to other creditors, and postpone the debts of the United States of the latter description, and even exclude them altogether. In the case before the court, the assignment expressly postpones the claims of the United States in favor of mere private creditors. It would be difficult to assign any sufficient motive for the legislature to allow the public debtors to avail themselves of such an injurious option. If, then, no reason can be perceived for such a distinction, grounded upon public policy, the language ought to be very clear, which should induce the court to adopt it. There should be no other rational means of interpreting the terms, so as to give them their full and natural meaning. This, we think, is not the predicament of the present language. Every word may have a fair construction, without introducing any such restrictive construction. There is this additional consideration which deserves notice, that, in our view, the act of 1797, c. 74, clearly embraces all debts of the United States, whether payable at the decease of the party, or afterwards. There is no reason to presume that the legislature intended to grant any peculiar favor to merchant importers; for otherwise the priority of the United States would have been withdrawn from all bonds for duties, and not (as the argument supposes) from a particular class of such bonds. And as there is no

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[ \* 39 ] repeal of the act of 1797, c. 74, except such as may \* arise by implication from the terms of the 65th section of the act of 1799, c. 128; if these terms cover only cases of bonds actually become due, they leave the act of 1797 in full force with regard to all other bonds.

But if this reasoning were less satisfactory to our minds than it is, there is another ground upon which we should arrive at the same conclusion. The act of 1799, c. 128, in the 62d section, prescribes the form of bonds for the payment of duties. It is the common form of a bond with a penalty upon a condition *underwritten*. The obligatory part admits a present existing debt due to the United States, which the party holds himself firmly bound to pay to the United States. The condition, in a legal sense, constitutes no part of the obligation, but is merely a condition, by a compliance with which the party may discharge himself from the debt admitted to be due by the obligatory clause. And accordingly it is well known, that in declarations on bonds with a condition, no notice need be taken of the existence of the condition. If the debtor would avail himself of it, he must pray *oyer* of it, and plead it by way of discharge. In the strictest sense, then, the bond is a *debitum in praesenti*, though looking to the condition it may be properly said to be *solvendum in futuro*, and we think that it is in the sense of this maxim, that the legislature is to be understood in the use of the words, "debt due to the United States." Wherever the common law would hold a debt to be *debitum in praesenti*, *solvendum in futuro*, the statute embraces it just as much as if it were presently payable.

It is not unimportant to state, that the construction which we have given to the terms of the act, is that which is understood to have been practically acted upon by the government, as well as by individuals, ever since its enactment. Many estates, as well of deceased persons, as of persons insolvent who have made general assignments, have been settled upon the footing of its correctness. A practice so long and so general would, of itself, furnish strong grounds for a liberal construction, and could not now be disturbed without introducing a train of serious mischiefs. We think the practice was founded in the true exposition of the terms and intent of [ \* 40 ] \* the act, but if it were susceptible of some doubt, so long an acquiescence in it would justify us in yielding to it as a safe and reasonable exposition.

This opinion will be certified to the circuit court of the North Carolina district.

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Davis v. Packard. 6 P.

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CHARLES A. DAVIS, CONSUL-GENERAL OF THE KING OF SAXONY,  
Plaintiff in Error, v. ISAAC PACKARD, HENRY DISDIER, AND WILLIAM  
MORPHY, Defendants in Error.

6 P. 41.

The plaintiff in error sued out of the court of errors of New York, a writ of error to the supreme court of that State, and assigned, as an error in fact, that he was consul-general in the United States for the king of Saxony; the defendants in error answered that this did not appear by the record of the supreme court; the court of errors affirmed the judgment of the supreme court: on a writ of error from this court under the 25th section of the Judiciary Act, (1 Stats. at Large, 65,) — *Held*, 1. That this court can notice nothing which took place in the state court unless it appears on the record; 2. That it is sufficient if it appears an act of congress was applicable to the case, and was misconstrued against the plaintiffs claim; 3. That this did appear, and this court had jurisdiction.

THE case is stated in the opinion of the court.

Sedgwick, for the motion.

J. M. White and A. S. Garr, contra.

\* THOMPSON, J., delivered the opinion of the court. [ \* 47 ]

This case comes up on a writ of error to the court for the correction of errors in the State of New York, being the highest court of law in that State, in which a decision in this suit could be had. And a motion has been here made to dismiss the writ of error for want of jurisdiction in this court.

From the record returned to this court, it appears that the cause went up to the court for the correction of errors in New York upon a writ of error to the supreme court of that State; and that in the court of errors, the plaintiff assigned as error in fact, that he, Charles A. Davis, before and at the time of the commencement of the suit against him, was and ever since hath continued to be, and yet is consul-general in the United States of his Majesty, the king of Saxony, duly admitted and proved as such by the President of the United States. And being such consul, he ought not, according to the constitution and laws of the United States, to have been impleaded in the said supreme court, but in the district court of the United States for the southern district of New York, or in some other district court of the said United States, and that the said supreme court had not jurisdiction, and ought not to have taken to itself the cognizance of the said cause. To this assignment of errors, the defendants in error answered, that there is no error in the record and proceedings aforesaid, nor in giving the judgment aforesaid, because they say, that it \* nowhere appears by the [ \* 48 ] said record, proceedings, or judgment, that the said Charles

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A. Davis ever was consul of the king of Saxony, and they pray that the said court for the correction of errors may proceed to examine the record and proceedings aforesaid, and the matter aforesaid, above assigned for error, and that the judgment aforesaid may be in all things affirmed.

The record then states, whereupon the court for the correction of errors, after having heard the counsel for both parties, and diligently examined, and fully understood, the causes assigned for error, and inspected the record and process aforesaid, did order and adjudge that the judgment of the supreme court be in all things affirmed.

The motion made in this court to dismiss the writ of error is founded and resisted upon affidavits, on each side, disclosing what took place in the court of errors in New York, on a motion there made to dismiss the writ of error to the supreme court of that State, and the opinion of the chancellor delivered in the court of errors, assigning his reasons for affirming the judgment of the supreme court, has also been laid before us.

We cannot enter into an examination of that question at all: whatever took place in the state court, which forms no part of the record sent up to this court, must be entirely laid out of view. This is the established course of this court, and neither the opinion of the chancellor, or the proceedings on the motion, forms a part of the record. 12 Wheat. 118. The question before this court is, whether the judgment was correct, not the ground on which that judgment was given. 6 Wheat. 603.

It has also been settled, that in order to give jurisdiction to this court under the 25th section of the Judiciary Act, (2d vol. Laws U. S. 65,) it is not necessary that the record should state in terms that an act of congress was in point of fact drawn in question. It is sufficient, if it appears from the record that an act of congress was applicable to the case, and was misconstrued, and the decision in the state court was against the privilege or exemption specially set up under such statute. 4 Wheat. 311; 2 Pet. 250; 3 Id. 301; 4 Id. 429. How stands the record, then, in this case? Charles A. Davis alleges that he is consul-general of the king of Saxony in the United States,

and that he is thereby privileged from being sued in the [ \*49 ] \*state court, according to the constitution and laws of the

United States. The fact of his being such consul is not denied by the joinder in error. The answer given is, that it nowhere appears by the record, proceedings, or judgment of the supreme court, that the said Davis was such consul; and the court of errors, in giving judgment say, after having examined and fully understood

*Davis v. Packard. 6 P.*

the causes assigned for error, they affirm the judgment of the supreme court. This was deciding against the privilege set up under the act of congress, which declares that the district court of the United States shall have jurisdiction, exclusively of the courts of the several States, of all suits against consuls and vice-consuls. (2d vol. Laws U. S. 60, § 9.)<sup>1</sup>

The question before this court is not whether the judgment of the supreme court in New York was correct. It is the judgment of the court for the correction of errors, that is to be reviewed here. That is, the final judgment in the highest court in the State, and none other, can be brought into this court, under the 25th section of the Judiciary Act.

Whether it was competent for Davis in the court of errors to assign, as error in fact, his exemption from being sued in a state court, is not a question presented by the record. No such question appears to have been raised or decided by the court. And judging from the ordinary course of judicial proceedings in such cases, we are warranted in inferring that no such question could have been made. For if the court of errors had entertained the opinion that such exemption could not be assigned for error in that court, the writ of error would probably have been dismissed. Or if the court had understood that the fact of his being consul was denied, an issue would probably have been directed to try that fact, under a provision in a statute of that State, which declares: "That whenever an issue of fact shall be joined upon any writ of error, returned into the court for the correction of errors, and whenever any question of fact shall arise upon any motion in relation to such writ, or the proceedings thereon, the court may remit the record to the supreme court, with directions to cause an issue to be made up by the parties, to try such question of fact at the proper circuit court or sittings, and to certify \*the verdict thereupon to the said [ \* 50 ] court for the correction of errors." (2d vol. Rev. Stat. New York, 601.)

From the record, then, we are necessarily left to conclude that the state court, assuming or admitting the fact that Davis was consul-general, as alleged in his assignment of errors, yet [decided that] it did not exempt him from being sued in a state court, which brings the case within the 25th section of the Judiciary Act; the decision having been against the exemption set up and claimed under a statute of the United States.

The motion to dismiss the writ of error is accordingly denied.

7 P. 276; 10 P. 368; 14 P. 614; 5 O. 140.

<sup>1</sup> 1 Stats. at Large, 76.

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Bank of the United States v. Dunn. 6 P.

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BANK OF THE UNITED STATES, Plaintiff in Error, *v.* JOHN O. DUNN,  
Defendant in Error.

6 P. 51.

An indorser is not a competent witness to prove that when a prior indorser put his name on the note he did so under a representation that sufficient bank stock, to secure payment of the note, had been pledged by the maker, and that his liability would be merely nominal; nor can oral evidence, to that effect, be allowed to control the contract of the indorser; nor had the president and cashier of a branch of the Bank of the United States authority to bind that bank by such a representation.

THE case is stated in the opinion of the court.

*Lear and Sergeant*, for the plaintiffs.

*Coxe*, contra.

[ \* 55 ] \* M'LEAN, J., delivered the opinion of the court.

In the circuit court for the District of Columbia, from which this cause is brought by writ of error, the plaintiffs commenced their action on the case against the defendant, as indorser of a promissory note. The general issue was pleaded, and at the trial the plaintiffs read in evidence the following note: —

\$1,000. Sixty days after date, I promise to pay John O. Dunn, or order, one thousand dollars, for value received, negotiable and payable at the United States Branch Bank in Washington.

JOHN SCOTT.

On the back of which was indorsed,

OVERTON CARR,  
J. O. DUNN.

The signatures of the parties were admitted, and proof was given of demand at the bank, and notice to the indorsers.

The defendant then offered as a witness Overton Carr, an indorser of said note, who testified that before he indorsed the same, he had a conversation with John Scott, the maker, and was informed by him that certain bank stock had been pledged, or was to be pledged, by Roger C. Weightman, as security for the ultimate payment of the said note, and that there would be no risk in indorsing

\* 56 ] it. That the witness then "went into the room of the cashier of the plaintiffs' office of discount and deposit at Washington, and found there the said cashier, and Thomas Swann, the president of the said office, to whom he communicated the conversation with Mr. Scott, and from whom he understood, upon inquiry, that the names of two indorsers residing in Washington were required upon the said note, as matter of form; and that he would incur no responsibility (or no risk) by indorsing

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the said note. He does not recollect the conversation in terms, but such was the impression he received from it.

That he went immediately to the defendant and persuaded him to indorse the note, by representing to him that he would incur no responsibility or no risk in indorsing it, as the payment was secured by a pledge of stock; and to whom he repeated the conversation with Mr. Scott, and said president and cashier. That no person was present at the conversation, the terms of which he does not recollect; but that the impression he received from this conversation with the aforesaid president and cashier, and with the said Scott, and which impression he conveyed to the defendant was, that the indorsers of said note would not be looked to for payment, until the security pledged had been first resorted to; but that the said indorsers would be liable in case of any deficiency of the said security to supply the same. That neither this witness nor Mr. Dunn was, at the time, able to pay such a sum, and that both indorsed the note as volunteers, and without any consideration, but under the belief that they incurred no responsibility, (or no risk,) and were only to put their names to the paper for form sake.

To which evidence the plaintiffs, by their counsel, objected; but the court permitted it to go to the jury.

The plaintiffs examined as a witness Richard Smith, the cashier, whose testimony was overruled; and then Thomas Swann, the president of the bank, was offered as a witness and rejected; it appearing that they were both stockholders in the bank. To this decision of the court, a bill of exceptions was taken by the plaintiffs, and exception was also taken to the evidence of Overton Carr.

On this last exception the plaintiffs rely for a reversal of \*the judgment of the circuit court. And first, the question [ \*57 ] as to the competency of this witness is raised.

He is not incompetent merely from the fact of his name being indorsed on the bill. To exclude his testimony, on this ground, he must have an interest in the result of the cause. Such interest is not apparent in this case; and any objection which can arise from his being a party to the bill, goes rather to his credibility than his competency.

But it is a well-settled principle, that no man who is a party to a negotiable note shall be permitted, by his own testimony, to invalidate it. Having given it the sanction of his name, and thereby added to the value of the instrument by giving it currency, he shall not be permitted to testify that the note was given for a gambling consideration, or under any other circumstances which would destroy its validity. This doctrine is clearly laid down in the case of Walton *et al.* as-

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signees of Sutton *v.* Shelley, reported in 1 Term R. 296, and is still held to be law, although in 7 Term R. 56, it is decided that in an action for usury, the borrower of the money is a competent witness to prove the whole case.

Several authorities are cited by the plaintiff's counsel to show that parol evidence is not admissible to vary a written agreement.

In the case of Hoare *et al. v.* Graham *et al.*, 3 Camp. 57, the court lay down the principle, that "in an action on a promissory note or bill of exchange, the defendant cannot give in evidence a parol agreement entered into when it was drawn, that it should be renewed and payment should not be demanded when it became due."

This court, in the case of Renner *v.* The Bank of Columbia, 9 Wheat. 587, in answer to the argument that the admission of proof of the custom or usage of the bank would go to alter the written contract of the parties, say: "If this is the light in which it is to be considered, there can be no doubt that it ought to be laid entirely out of view; for there is no rule of law better settled, or more salutary in its application to contracts, than that which precludes the admission of parol evidence to contradict or substantially vary the legal import of a written agreement."

Parol evidence may be admitted to explain a written [ \* 58 ] agreement where there is a latent ambiguity, or a want of consideration may be shown in a simple contract; or, to defeat the plaintiff's action, the defendant may prove that the note was assigned to the plaintiff, in trust, for the payer. 6 Mass. 432.

It is competent to prove by parol that a guarantor signed his name in blank, on the back of a promissory note, and authorized another to write a sufficient guarantee over it. 7 Mass. 233.

To show in what cases parol evidence may be received to explain a written agreement, and where it is not admissible, the following authorities have been referred to: 8 Taunt. 92; 1 Chit. 661; Peake's Cases, 40; Gilbert's R. 154.

On the part of the defendant's counsel it is contended, that between parties and privies to an instrument not under seal, a want of consideration, in whole or in part, may be shown. That the indorsement in question was made in blank, and that it is competent for the defendant to prove under what circumstances it was made. That if an assurance were given at the time of the indorsement that the names of the defendant and Carr were only required as a matter of form, and that a guarantee had been given for the payment of the note, so as to save the indorsers from responsibility, it may be proved, under the rule which permits the promisor to go into the consideration of a note or bill between the original parties.

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In support of this position, authorities are read from 5 Serg. & Rawle, 363, and 4 Wash. C. C. R. 480. In the latter case, Mr. Justice Washington says: "The reasons which forbid the admission of parol evidence to alter or explain written agreements and other instruments, do not apply to those contracts implied by operation of law, such as that which the law implies in respect to the indorser of a note of hand. The evidence of the agreement made between the plaintiffs and defendants, whereby the latter were to be discharged on the happening of a particular event, was therefore properly admitted." The decision in 5 Serg. & Rawle was on a question somewhat analogous to the one under consideration, except in the present case there is no allegation of fraud, and the decision in that case was made to turn in part, at least, on that ground.

In Pennsylvania, there is no court of chancery, and it is known that the courts in that State admit parol proof to affect written contracts, to a greater extent than is sanctioned in [ \* 59 ] the States where a chancery jurisdiction is exercised. The rule has been differently settled in this court.

The note in question was first indorsed by the defendant to Carr, and by him negotiated with the bank. It was discounted on the credit of the names indorsed upon the note. This is the legal presumption that arises from the transaction; and if the first indorser were permitted to prove that there was a secret understanding between himself and his assignees that he should not be held responsible for the payment of the note, would it not seriously affect the credit of this description of paper? Might it not, in many cases, operate as a fraud upon subsequent indorsers?

The liability of parties to a bill of exchange, or promissory note, has been fixed on certain principles, which are essential to the credit and circulation of such paper. These principles originated in the convenience of commercial transactions, and cannot now be departed from.

The facts stated by the witness Carr are in direct contradiction to the obligations implied from the indorsement of the defendant. By his indorsement, he promised to pay the note at maturity, if the drawer should fail to pay it. The only condition on which this promise was made, was, that a demand should be made of the drawer when the note should become due, and a notice given to the defendant of its dishonor. But the facts stated by the witness would tend to show that no such promise was made. Does not this contradict the instrument? and would not the precedent tend to shake, if not destroy, the credit of commercial paper? On this ground alone the exception would be fatal; but the most decisive objection to the evi-

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dence is, that the agreement was not made with those persons who have power to bind the bank in such cases. It is not the duty of the cashier and president to make such contracts; nor have they the power to bind the bank, except in the discharge of their ordinary duties.

All discounts are made under the authority of the directors, and it is for them to fix any conditions which may be proper in loaning money. If, therefore, the evidence were clear of other legal objections, it could not have the effect to release the defendant [ \* 60 ] from liability. The assurances relied on, if made, \* were not made by persons authorized to make them. The bank is not bound by them; nor would it be bound if the assurances had been made in so specific and direct a manner as to create a personal responsibility on the part of the cashier and president.

Upon a full view of the case, the court are clearly of the opinion, that the evidence of Carr should have been overruled by the circuit court; or they should have instructed the jury that the facts proved were not in law sufficient to release the defendant from liability on his indorsement. The judgment of the circuit court must, therefore, be reversed, and a *venire de novo* awarded.

8 P. 12; 11 P. 86; 12 P. 145; 15 P. 877; 3 H. 73; 4 H. 404; 5 H. 278; 20 H. 442; 21 H. 386; 1 Wal. 166; 10 W. 672; 5 O. 481.

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**HENRY MILLER'S HEIRS AND DEVISEES, Complainants and Appellants, v. JACOB AND ISAAC M'INTYRE, Appellees.**

6 P. 61.

If new parties are made by amending a bill in equity, the statute of limitations does not cease to run in their favor until they are thus made parties.

In equity, as well as at law, a statute of limitations is a bar, where the conflicting titles are adverse in their origin, and one was equitable and the other legal.

THE case is stated in the opinion of the court.

*Doddridge* and *Denny*, for the appellants.

*Wickliffe* and *Daniel*, contra.

[ \* 62 ] \* *M'LEAN*, J., delivered the opinion of the court.

This cause was appealed from the decree of the circuit court of the United States for the District of Kentucky. The original bill was filed in May, 1808, in which the complainants stated, that on the 10th of December, 1782, their ancestor, Henry Miller, made an entry of 1,687 acres of land, which was surveyed the 9th of April, 1804, and patented the 19th of July, 1820. That the defend-

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ants were in possession of the land under said claims; and the bill prayed that they might be compelled to disclose their titles, and surrender the possession of the premises.

In June, 1815, the complainants amended their bill, and, among other things, stated that, on the 19th of May, 1780, Nicholas M'Intyre entered a thousand acres of land on the waters of the Licking, &c., and having caused the same to be surveyed, contrary to location, obtained a patent, elder in date than the complainants'. That this land was devised by Nicholas M'Intyre to his sons Isaac and Jacob; and that Isaac conveyed to John M'Intyre, who is made a defendant. Jacob M'Intyre and several others are also made defendants. In 1816, Jacob M'Intyre filed his answer, in which he admits the entry of his ancestor, as stated by the complainants, and sets forth an amendment of the said entry, made on the 14th of December, 1782. By this amendment, it seems, the entry was made to interfere with complainants' entry.

An amended answer was filed by Jacob M'Intyre, in May, 1822, in which he claims the benefit of the statute of limitations from an occupancy of the land more than twenty years before suit was brought. Isaac M'Intyre seems never to have been served with process, or made a defendant to the amended bill. This was deemed unnecessary; it is presumed from the fact stated in the bill, that he had conveyed his interest to John M'Intyre.

In his answer, filed in December, 1821, John M'Intyre, states, that the legal title to no part of the thousand acres is vested in him; but that he holds a bond, executed by Nicholas M'Intyre, for a moiety of the said tract; and that a deed for the same had been executed to him by Isaac M'Intyre, but that it had never been recorded. He alleges, that an adverse possession of more than twenty years, by himself and those claiming under him, is a bar to the plaintiffs' right.

\* The cause was twice appealed to the supreme court [ \*63 ] from the decrees of the circuit court; and on the second appeal, the decree dismissing the bill was reversed, on the ground that under the land law the survey of the complainants was made in due time, and that the patent was legally issued. And the cause was remanded to the circuit court for further proceedings; and leave was given to the parties to take testimony. 2 Wheat. 316; 11 Wheat. 441. Additional testimony was taken, chiefly with the view of proving the possession of the defendants under the M'Intyre patent.

As the complainants' title was sustained by the decree of this court, in 1826, the defendants do not attempt to impeach it, but rely exclusively on their possession.

In April, 1792, Kentucky adopted a constitution, and she was

admitted into the union as an independent state the ensuing session of congress.

By the first section of the schedule, which was adopted with the constitution, it is provided, "that all rights, actions, prosecutions, claims and contracts, as well of individuals as of bodies corporate, shall continue as if the said government had not been established."

The statute of limitations, which was passed by the legislature of Kentucky, on the 17th of December, 1796, was a literal copy of the Virginia statute ; which was in force before the entries now in controversy were made. This statute therefore operated upon the rights of the parties, while the District of Kentucky formed a part of the State of Virginia, and afterwards by the adoption of the convention. It was not repealed by the statute of 1796, but reenacted in all its parts.

In the second section of this statute it is provided, " that all writs, &c., upon any title heretofore accrued, or which may hereafter fall or accrue, shall be sued out within twenty years next after such title or cause of action accrued, and not afterwards ; and that no person or persons who now hath, or have, or may hereafter have any right or title of entry, into any lands, tenements, or hereditaments, shall make any entry, but within twenty years next after such right or title accrued ; and such person shall be barred from any entry afterwards." " Provided, nevertheless, that if any person or persons, entitled to such writ or writs, or to such right or title of [ \*64 ] entry as aforesaid, shall be under age, &c., or not within the commonwealth at the time such right or title accrued or coming to them ; every such person and his or her heirs shall and may, notwithstanding the said twenty years are or shall be expired, bring or maintain his action, or make his entry, within ten years next after such disabilities removed, or death of the person so disabled, and not afterwards."

By Josiah M'Dowell, David Jamison, James Sonce, Michael Hornback, and other witnesses, it is satisfactorily proved, that possession was taken of the land in controversy, under the M'Intyre grant, by the defendants or persons claiming under them, in the spring of the year 1788 or 1789. The weight of testimony is in favor of the former period. It is also made to appear, that the possession was adverse to the complainants' title, and coextensive with the limits of the patent. If an entry be made under a grant, and there is no adverse possession, the entry will be limited only by the grant, unless the contrary appear.

Various reasons are assigned against the operation of the statute in this case.

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It is insisted, that the amended bill, filed in 1815, by which the defendants were made parties to the bill, has relation to the commencement of the suit in 1808, and consequently, that the statute cannot bar, as its limitation had not then run.

Until the defendants were made parties to the bill, the suit cannot be considered as having been commenced against them. It would be a novel and unjust principle to make the defendants responsible for a proceeding of which they had no notice, and where a final decree in the case could not have prejudiced their rights.

Where the statute is pleaded, at law or in equity, and the plaintiff desires to bring himself within its savings, it would be proper for him in his replication, or by an amendment of his bill, to set forth the facts specially. This has not been done in the present case; but as there are other grounds on which the decision may rest, this objection will not be further noticed.

The adverse possession was taken in this case in the spring of 1788 or 1789. In the spring of 1796, the ancestor of the complainants died, and his heirs brought suit against the present defendants in June, 1815. From some of the depositions [ \* 65 ] it appears that a part of the complainants were not of full age, in April, 1804; but how soon afterwards this disability ceased, is not proved. Unless the disability be shown to exist, so as to protect the rights of the complainants, the effect of the statute, on that ground, cannot be avoided.

At least twenty-six years elapsed after the adverse possession was taken by the defendants, before suit was brought against them by the complainants, and nineteen years from the decease of their ancestor.

As the statute of Virginia was made the statute of Kentucky, by adoption, in 1792, if the adverse possession which had been held for several years, commenced at that time, or when the constitution formed by Kentucky was sanctioned by congress, it would give a possession of about twenty-two years; eighteen or nineteen of which were subsequent to the decease of the complainants' ancestor.

Under this state of facts, it is clear that the statute constitutes a bar, unless it shall be shown not to operate against the complainants' title.

As the limitation of the statute, both as to the twenty years' adverse possession, and the ten years' subsequent to the decease of the complainants' ancestor, had run since 1793, before suit was commenced, it is unnecessary to inquire what effect the Virginia statute had upon the rights of the parties before it was adopted by Kentucky.

It is earnestly contended that the statute does not run against an

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equitable title, and consequently, that it cannot operate as a bar in this case, as the legal title was not vested in the complainants until the emanation of their patent in 1820.

On this ground the counsel seem chiefly to rely, and several authorities are referred to in support of it.

In 4 Bibb, 372, the court say, it is a general rule that a court of equity will not relieve against a possession with right, after the lapse of twenty years; but they do not determine whether this rule applies where the conflicting titles are adverse in their origin. 2 Mar. 570; 1 Mar. 53, 506; 3 Mar. 146, are cited to show that the statute does not run, except against a grant. This is undoubtedly the case at law, but a different rule has been established in equity. The [ \* 66 ] courts in Kentucky \*and elsewhere, by analogy, apply the statute in chancery to bar an equitable right, where at law it would have operated against a grant.

This principle has been so well established, and so generally sanctioned by courts of equity, that it can hardly be necessary to enter into an investigation of it.

At first the rule was controverted, and afterwards frequently evaded, on the ground of implied trusts; but the modern decisions have uniformly sustained the principle. This doctrine is ably discussed in the case of the Marquis of Cholmondeley *v.* Lord Clinton, reported in 2 Jacob & Walker, 1. In that case, it is said that "at all times, courts of equity have, upon general principles of their own, even where there was no statutable bar, refused relief to stale demands; where the party has slept upon his rights, and acquiesced for a great length of time."

At law, the statute operates where the conflicting titles are adverse in their origin, and no reason is perceived against giving the same effect to the statute in equity.

In the case of Elmendorf *v.* Taylor, 10 Wheat. 168, the chief justice in giving the opinion of the court, says, "from the earliest ages courts of equity have refused their aid to those who have neglected, for an unreasonable length of time, to assert their claims; especially where the legal estate has been transferred to purchasers without notice." That "although the statutes of limitations do not, either in England or in these States, extend to suits in chancery, yet the courts in both countries have acknowledged their obligations." In referring to the case of Cholmondeley *v.* Clinton, he says, "it was considered and treated by the court as a case of the highest importance; and the opinion was unequivocally expressed that, both on principle and authority, the laches and non-claim of the rightful owner of an equitable estate for a period of twenty years, (supposing it the case of one

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who must within that period have made his claim in a court of law had it been a legal estate,) under no disability, and where there has been no fraud, will constitute a bar to equitable relief, by analogy to the statute of limitations, if during all that period the possession has been held under a claim unequivocally adverse." This case was appealed to the house of lords, where the lord chancellor considered that twenty years constituted a bar; the pos- [ \*67 ] session being adverse. And Lord Redesdale declared that "they had always considered the provision in the statute of James," which is similar to the Kentucky statute under consideration, and "which applied to rights and titles of entry, in which the period of limitation was twenty years, as that by which they were bound; and it was that upon which they had constantly acted."

In the conclusion of the opinion, the chief justice says, "in all cases, where an adverse possession has continued for twenty years, it constitutes, in the opinion of this court, a complete bar in equity."

From the above authorities, it appears the rule is well settled, both in England and in this country, that effect will be given to the statute of limitation, in equity, the same as at law. And as in this case there could be no doubt, if the complainants' ancestor had held by grant at the time the adverse possession was taken, that the statute would have barred the right of entry; the same effect must be given to it in equity.

The decree of the circuit court, dismissing the bill, is affirmed.

6 P. 124, 622; 9 P. 405; 10 P. 177; 12 P. 241; 1 H. 189; 5 H. 233; 22 W. 246;

8 O. 383.

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### JOHN SMITH T., Plaintiff, v. ROBERT BELL, Defendant.

6 P. 68.

Bequest to the testator's wife of all his personal estate, "to and for her own use, benefit, and disposal, absolutely; the remainder of the said estate, after her decease, to be for the use of the said Jesse Goodwin," the son of the testator—*Held*, the bequest to the son cut down the interest of the wife to a life estate, and the son took a vested remainder.

THE case is stated in the opinion of the court.

*Key and Grundy*, for the plaintiff.

No counsel *contra*.

\* MARSHALL, C. J., delivered the opinion of the court. [ \*74 ]

This case is adjourned to this court from the court of the United States for the seventh circuit and district of East Tennessee, on a point on which the judges of that court were divided in opinion.

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The plaintiff brought an action of trover and conversion against the defendant, for several slaves in his declaration mentioned. He claimed the slaves under the following clause in the will of Britain B. Goodwin: "also, I give to my wife, Elizabeth Goodwin, all my personal estate whatsoever and wheresoever, and of what nature, kind, and quality soever, after payment of my debts, legacies, and funeral expenses, which personal estate I give and bequeath unto my said wife, Elizabeth Goodwin, to and for her own use and benefit, and disposal absolutely; the remainder of the said estate, after her decease, to be for the use of the said Jesse Goodwin."

- [ \*75 ] \*Elizabeth Goodwin took the estate of the testator into her possession and intermarried with Robert Bell, the defendant. After which the said Jesse Goodwin sold his interest therein to the plaintiff, who, after the death of Elizabeth, instituted this suit. Upon the trial the following questions occurred, on which the judges were divided in opinion: "whether, by the will of said Britain B. Goodwin, said Elizabeth Goodwin had an absolute title to the personal estate of said Britain B. Goodwin, or only a life estate; and also, whether said Jesse Goodwin, by said will, had a vested remainder that would come into possession on the death of said Elizabeth, or was said remainder void?"

The first and great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law. Doug. 322; 1 Black. 672. This principle is generally asserted in the construction of every testamentary disposition. It is emphatically the will of the person who makes it, and is defined to be "the legal declaration of a man's intentions, which he wills to be performed after his death." 2 Black. Com. 499. These intentions are to be collected from his words, and ought to be carried into effect if they be consistent with law.

In the construction of ambiguous expressions, the situation of the parties may very properly be taken into view. The ties which connect the testator with his legatees, the affection subsisting between them, the motives which may reasonably be supposed to operate with him, and to influence him in the disposition of his property, are all entitled to consideration in expounding doubtful words, and ascertaining the meaning in which the testator used them.

In the will under consideration, but two persons are mentioned: a wife and a son. The testator attempts, in express words, to make a provision for both out of the same property. The provision for the wife is immediate; that for the son is to take effect after her death. The words of the will make both provisions, but it is doubted whether

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both can have effect. In the first member of the sentence he says, "I give to my wife Elizabeth Goodwin, all my personal estate whatsoever and wheresoever, and of what nature, kind, and quality soever, \*after payment of my debts, legacies, and funeral [ \*76 ] expenses; which personal estate I give and bequeathe unto my said wife, Elizabeth Goodwin, to and for her own use and benefit and disposal absolutely."

It must be admitted that words could not have been employed which would be better fitted to give the whole personal estate absolutely to the wife, or which would more clearly express that intention. But the testator proceeds: "the remainder of said estate, after her decease, to be for the use of the said Jesse Goodwin." Jesse Goodwin was his son.

These words give the remainder of the estate, after his wife's decease, to the son, with as much clearness as the preceding words give the whole estate to his wife. They manifest the intention of the testator to make a future provision for his son, as clearly as the first part of the bequest manifests his intention to make an immediate provision for his wife. If the first bequest is to take effect according to the obvious import of the words taken alone, the last is expunged from the will. The operation of the whole clause will be precisely the same as if the last member of the sentence were stricken out; yet both clauses are equally the words of the testator, are equally binding, and equally claim the attention of those who may construe the will. We are no more at liberty to disregard the last member of the sentence than the first. No rule is better settled, than that the whole will is to be taken together, and is to be so construed as to give effect, if it be possible, to the whole. Either the last member of the sentence must be totally rejected, or it must influence the construction of the first so as to restrain the natural meaning of its words; either the bequest to the son must be stricken out, or it must limit the bequest to the wife, and confine it to her life. The limitation in remainder, shows that, in the opinion of the testator, the previous words had given only an estate for life. This was the sense in which he used them.

It is impossible to read the will without perceiving a clear intention to give the personal estate to the son after the death of his mother. "The remainder of the said estate, after her decease, to be for the use of the said Jesse Goodwin." Had the testator been asked whether he intended to give any thing \*by this [ \*77 ] bequest to his son, the words of the clause would have answered the question in as plain terms as our language affords.

If we look to the situation of the parties, to the motives which

might naturally operate on the testator, to the whole circumstances, so far as they appear in the case, we find every reason for supporting the intention which the words, giving effect to all, of themselves import.

The only two objects of the testator's bounty were his wife and his son. Both must have been dear to him. The will furnishes no indication of his possessing any land. His personal estate was probably small, too small to be divided. It appears to have consisted of a negro woman and four others, probably her children. Their relative ages, which are stated in the plaintiff's declaration, would indicate that the woman was the mother of the other four. A sixth is sued for, but he was not born at the death of the testator. The value of the other articles, which constituted his personal estate, is not mentioned, but it was probably inconsiderable. Farmers and planters having no real estate, and only five slaves, a woman and four children, have rarely much personal estate in addition to their slaves. The testator was not in a condition to make any present provision for an only child, without lessening that he wished to make for his wife. He therefore gives to his son only a horse and one feather bed. The residue is given to his wife.

What feelings, what wishes might be supposed to actuate a husband and a father having so little to bestow on a wife and child he was about to leave behind him? His affections would prompt him to give something to both. He could not be insensible to the claims of either. But if his property would not, in his opinion, bear immediate division, the only practicable mode of accomplishing his object would be to give a present interest to one, and a future interest to the other. All his feelings would prompt him to make, as far as was in his power, a comfortable provision for his wife during her life, and for his child after her decease. This he has attempted to do. No principle in our nature could prompt him to give his property to the future husband of his wife, to the exclusion of his only child. Every

consideration, then, suggested by the relation of the parties [ \*78 ] and the circumstances of the case, comes \*in aid of that construction which would give effect to the last as well as first clause in the will, which would support the bequest of the remainder to the son, as well as the bequest to the wife. It is not possible to doubt that this was the intention of the testator.

Is this intention controverted by any positive rule of law? Has the testator attempted to do that which the law forbids?

The rule that a remainder may be limited, after a life estate in personal property, is as well settled as any other principle of our law. The attempt to create such limitation is not opposed by the policy

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of the law, or by any of its rules. If the intention to create such limitation is manifested in a will, the courts will sustain it. Some other rule of law, then, must bear on the case, or the intention will prevail.

It is stated in many cases that, where there are two intents inconsistent with each other, that which is primary will control that which is secondary ; but the intent to provide for the wife during life, is not inconsistent with the intent to provide for the son by giving him the same property after her decease. The two intents stand very well together, and are consistent, as well with the probable intention as with the words of the testator. The intention to give the personal estate absolutely to the wife, is, it is true, inconsistent with the intention to give it after her decease to his son. But which of them is the primary intent ? which ought to control the other ? If we are governed by the words, if we endeavor to give full effect to them all, or if we are influenced by the relation of the parties, and the motives which probably governed in making the will, no such inconsistent intentions exist ; but if they do exist, we perceive no motive for ascribing any superior strength to that which would provide for those who might claim the estate of the wife after her decease, to that which would provide, after her decease, for the only child of the testator.

To create these inconsistent intentions, this intention to do, in limiting this remainder, what the policy of the law forbids, the bequest to the wife must be construed to give her the power to sell or consume the whole personal estate during her life, which is totally incompatible with a gift of what remains at her death. The remainder, after such a bequest, is said to be void for uncertainty.

\* As this construction destroys, totally, the legacy, obviously [ \* 79 ] intended for the son by his father, it will not be made unless it be indispensable. No effort to explain the words in a different sense can do so much violence to the clause, as the total rejection of the whole bequest given in express terms, to an only son.

The first part of the clause which gives the personal estate to the wife would, undoubtedly, if standing alone, give it to her absolutely. But all the cases admit that a remainder limited on such a bequest, would be valid, and that the wife would take only for life. The difficulty is produced by the subsequent words. They are "which personal estates I give and bequeathe unto my said wife, Elizabeth Goodwin, to and for her own use and benefit, and disposal absolutely." The operation of these words, when standing alone, cannot be questioned. But suppose the testator had added the words "during her life." These words would have restrained those which

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preceded them, and have limited the use and benefit and the absolute disposal given by the prior words, to the use and benefit, and to a disposal for the life of the wife. 13 Ves. 444. The words, then, are susceptible of such limitation. It may be imposed on them by other words. Even the words "disposal absolutely," may have their absolute character qualified by restraining words connected with and explaining them to mean such absolute disposal as a tenant for life may make.

If this would be true, provided the restraining words "for her life" had been added, why may not other equivalent words, others which equally manifest the intent to restrain the estate of the wife to her life, be allowed the same operation? The words "the remainder of said estate, after her decease, to be for the use of the said Jesse Goodwin," are, we think, equivalent. They manifest with equal clearness the intent to limit the estate given to her, to her life, and ought to have the same effect. They are totally inconsistent with an estate in the wife, which is to endure beyond her life.

Notwithstanding the reasonableness and good sense of this general rule, that the intention shall prevail, it has been sometimes disregarded.

If the testator attempts to effect that which the law forbids, [ \* 80 ] his will must yield to the rules of law. But \* courts have sometimes gone further. The construction put upon words in one will, has been supposed to furnish a rule for construing the same words in other wills, and thereby to furnish some settled and fixed rules of construction which ought to be respected.

We cannot say that this principle ought to be totally disregarded, but it should never be carried so far as to defeat the plain intent, if that intent may be carried into execution without violating the rules of law. It has been said truly, 3 Wils. 142, "that cases on wills may guide us to general rules of construction; but, unless a case cited be in every respect directly in point, and agree in every circumstance, it will have little or no weight with the court, who always look upon the intention of the testator as the polar-star to direct them in the construction of wills."

In Porter v. Tournay, 3 Ves. 311, Lord Alvanley declared his opinion to be, "that a gift for life, if specific, of things *qua ipso usu consumuntur*, is a gift of the property, and that there cannot be a limitation after a life-interest in such articles." In the case of Randall v. Russell, 3 Mer. 190, the master of the rolls inclines to the same opinion. But these cases do not turn on the construction of the wills, but on the general policy of the law in cases where the legacy is of articles where "the use and the property can have no separate existence."

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One of the strongest cases in which the court of chancery has decided that the legatee first named took absolutely, though there was a limitation in remainder, is that of *Bull v. Kingston*, 1 Mer. 314.

Ann Ashby, by her will, gave the sum of £1,500, bank annuities, to John Earl Talbot, his executors, &c., in trust for her sister Charlotte Williams, for her separate use; and "all other sums that may be due to her," she left in trust with the said John Earl Talbot, for the use of her said sister. "What I have not otherwise disposed of, I give to my said sister the unlimited right of disposing of by will, excepting to E. P. &c.; and in case my said sister dies without a will, I give all that may remain of my fortune at her decease to my godson, William Ashby. The rest and residue of my fortune I give to my sister Charlotte Williams, making her the sole executrix of this my last will and testament."

\* Charlotte Williams made a will, by which she appears [ \*81 ] to have disposed of the whole of her own estate, but not to have executed the power contained in the will of Ann Ashby. What remained of her estate was claimed by the representative of the husband, who survived his wife, Charlotte Williams; and also by William Ashby, under the bequest to him of what might remain at the decease of Charlotte Williams, if she should die without a will. The master of the rolls being of opinion that the whole vested in Charlotte Williams, decided in favor of the representative of her husband, and that the bequest to William Ashby was void.

In support of this decree it might be urged that, as the remainder to William Ashby was limited on the event of her sister dying without a will, which event did not happen, the remainder could not take effect. Or, which is stronger ground, that the whole will manifests an intention to give every thing to her sister; and that the eventual limitation in favor of William Ashby, accompanied as it is by various explanatory provisions, does not show such an intention in his favor as to defeat the operation of the clauses in favor of Charlotte Williams, which show a superior solicitude to provide for her. The testatrix gives to her sister the unlimited right of disposing of whatever may not have been bequeathed by herself, thereby enabling her to defeat the contingent remainder to William Ashby; and then gives to her sister all the rest and residue of her fortune. The sister is obviously, on the face of the whole will taken together, the favorite legatee; and no violence is done to the intention by giving to bequests to her their full effect, uncontrolled by the contingent remainder to William Ashby.

But the master of the rolls does not place his decree on this ground, and we must understand it as he understood it himself.

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He says, it is impossible to make sense of the will if the residuary clause is to be taken as distinct from what goes before it. "It is evident the testatrix perceived a defect in her intended disposition of the entire property in favor of Mrs. Williams, and that she had only given a power where she meant to give the absolute interest. To supply that defect, she gives the residue by the clause in [ \* 82 ] question; and then the will \* is to be read as if it stood thus: 'I give to Charlotte Williams the residue of my estate, together with the right of disposing of the same by will, except to E. P.; and if she dies without a will, then I give whatever may remain at her death to William Ashby.' She gives to Charlotte Williams, as a married woman, the right of disposing by will of the property vested in her, independently of the control of her husband, and she intended at the same time that, if any thing was left undisposed of by her, it should go to William Ashby. But this is an intention that must fail on account of its uncertainty. Charlotte, therefore, took the absolute interest in the property," &c.

This opinion is not so carefully expressed as to remove all doubts respecting its real meaning, and to show precisely whether the uncertainty, which destroyed the validity of the remainder, belonged to all cases in which property was given in general terms, with a power to use it and to dispose of it; or belonged to those cases only in which analogous circumstances were found. The master of the rolls admits that the testatrix intended to dispose of the entire property in favor of Mrs. Williams, but perceived that she had only given a power, where she meant to give the absolute interest. In speaking afterwards of the right given to Charlotte Williams of disposing by will, he says, it is "of the property vested in her, independent of the control of her husband."

The whole opinion furnishes strong reason to believe that the master of the rolls considered himself as pursuing the intention of the testatrix in declaring the remainder void, and that Charlotte Williams took absolutely. It would be difficult, we think, to support the proposition that a personal thing, not consumed by the use, could not be limited in remainder after a general bequest to a person in being, with a power to use and even dispose of it; provided the whole will showed a clear intention to limit the interest of the first taker to his life.

In *Upwell v. Halsey*, 1 P. W. 651, the testator directs "that such part of his estate as his wife should leave of her subsistence should return to his sister and the heirs of her body." The court observed, "as to what has been insisted on, that the wife had a power over the capital or principal sum; that is true, provided it had been

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necessary for her subsistence; \*not otherwise; so that her [ \*83 ] marriage was not a gift in law of this trust money. Let the master see how much of this personal estate has been applied for the wife's subsistence; and, for the residue of that which came to the defendant, the second husband's hands, let him account."

This decree is founded on the admission that, in a case in which the first taker might expend an uncertain part of the thing given, a remainder might be limited. The uncertainty of the sum which might remain, formed no objection. The cases are numerous in which the intent has controlled express words.

In the case of Cowper v. Earl Cowper, 2 P. W. 720, several questions were discussed, which arose on the will of Robert Booth; one of which was founded on a bequest of money to Mr. Samuel Powell, to be laid out in lands, to be settled "in trust for and to the use of my son and daughter, William Cowper, Esq., and Judith, his wife, for the term of their lives, and after the decease of my daughter, then to the child or children," &c. It became a question of some importance whether the limitation over took effect on the death of the daughter, or on the death of the husband, who survived her. The master of the rolls was of opinion that it took effect on the death of the wife, being of opinion that the express words giving the estate to both for their joint lives, though always adjudged to carry the estate to the survivor, were restrained to the wife by the subsequent words which give the remainder "after the decease of his daughter." "If the latter words be not so taken, they must," he says, "be totally rejected."

After reviewing the various decisions on the effect of such limitations, he adds, "so in our case, the words subsequent to the limitation, 'and after the decease of my daughter to the child or children,' &c., show the testator's intent, and must determine the effects of the limitation, especially in a will, where the intent overrules the legal import of the words; be they never so express and determinate."

In finding this intent, every word is to have its effect. Every word is to be taken according to the natural and common import; but, whatever may be the strict grammatical construction of the words, that is not to govern if the intention of the testator \*unavoidably requires a different construction. 4 Ves. 57, [ \*84 ] 311, 329.

The court said, in Sims v. Doughty, 5 Ves. 247, "and if two parts of the will are totally irreconcilable, I know of no rule but by taking the subsequent words as an indication of a subsequent intention."

Blackstone, in his Commentaries, vol. ii. 380, asserts the same principle. The approved doctrine, however, unquestionably is, that

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they should, if possible, be reconciled, and the intention be collected from the whole will.

In the case before the court, it is, we think, impossible to mistake the intent. The testator unquestionably intended to make a present provision for his wife, and a future provision for his son. This intention can be defeated only by expunging, or rendering totally inoperative, the last clause of the will. In doing so, we must disregard a long series of opinions, making the intention of the testator the polar star to guide us in the construction of wills, because we find words which indicate an intention to permit the first taker to use part of the estate bequeathed.

This suit is brought for slaves,—a species of property not consumed by the use, and in which a remainder may be limited after a life estate. They composed a part, and probably the most important part, of the personal estate given to the wife, “to and for her own use and benefit, and disposal absolutely.” But in this personal estate, according to the usual condition of persons in the situation of the testator, there were trifling and perishable articles, such as the stock on a farm, household furniture, and the crop of the year, which would be consumed in the use, and over which the exercise of absolute ownership was necessary to a full enjoyment. These may have been in the mind of the testator when he employed the strong words of the bequest to her. But be this as it may, we think the limitation to the son on the death of the wife restrains and limits the preceding words so as to confine the power of absolute disposition, which they purport to confer of the slaves, to such a disposition of them as may be made by a person having only a life estate in them. This opinion is to be certified to the circuit court.

8 O. 324.

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JAMES MOORE, Defendant below, now Plaintiff in Error, *v.* THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF COLUMBIA, Defendants in Error.

6 P. 86.

Proof that the promisor of a note, which had been discounted at the bank, was heard to say to a third person who congratulated him on being free from debt, “yes, except one d—d \$500 in the Bank of Columbia, which I can pay at any time,” and that this note was the only one of his then in the bank, does not amount to a new promise, nor to enough to cause one to be implied, and does not remove the bar of the statute of limitations.

THE case is stated in the opinion of the court.

Z. C. Lee and Jones, for the plaintiff.

Lear and Sergeant, contra.

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\* THOMPSON, J., delivered the opinion of the court. [ \* 90 ]

The only question in this case is, whether the evidence offered upon the trial was sufficient to prevent the statute of limitation from barring the action.

The suit was founded upon a promissory note made by the plaintiff in error, bearing date the 25th of April, 1816, by which, sixty days after date, he promised to pay Gilbert Docker, or order, \$500, value received, at the Bank of Columbia.

The note was duly indorsed to the Bank of Columbia, and in July, 1825, a suit was commenced in the circuit court of the United States for the District of Columbia, upon that note. The statute of limitations, among other pleas, was interposed; and the plaintiff in the court below, to take the case out of the statute, proved by William A. Rind, that, in the summer of 1823, he went into a tavern to read the newspapers, when he saw in the public room the defendant, James Moore, and two companions, drinking, Moore appearing to be elevated with what he had drank; and whilst there looking at the newspapers, he overheard a conversation between the defendant and his \*two companions, in which they were bantering him [ \* 91 ] about his independent circumstances, and of his being so clear of debt or of the banks; when the defendant jumped up and danced about the room, exclaiming, "yes, except one damned \$500 in the Bank of Columbia, which I can pay at any time." No part of this conversation was addressed to the witness. The witness had been a clerk in the bank, but was then in the prison bounds in the city of Washington, and after his discharge from prison, he immediately returned to the bank in Georgetown. The witness believed the defendant knew him to be a clerk in the bank. At this time he, the witness, knew the note in question was lying over in bank, and he knows of no other \$500 note of the defendant in that bank but what is paid. The plaintiffs further proved that, upon examination of their books, no other discounted note of the defendant stood charged to him at the time of the conversation referred to by the witness.

Upon this evidence the defendant prayed the court to instruct the jury that the evidence aforesaid did not import such an acknowledgment of the debt in question as was sufficient to take it out of the statute of limitations, which instruction the court refused, and permitted the evidence to go to the jury as evidence of an acknowledgment to repel the bar of the statute. The jury found a verdict for the plaintiff. A bill of exceptions was taken to the decision of the court, and the case is brought here by writ of error.

The question as to what shall be a sufficient acknowledgment or

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promise to take a case out of the statute, has frequently received the attention and examination of this court, and the cases both in England and in this country have been critically reviewed. It is deemed unnecessary again to travel over this ground, but it is sufficient barely to apply some of the rules and principles to be extracted from these cases, to the facts in the one now before us.

This court, in the case of *Clemenston v. Williams*, 8 Cranch, 72, nearly twenty years since, expressed a very decided opinion, that courts had gone quite far enough in admitting acknowledgments and

[ \* 92 ] confessions to bar the operation of the statute of limita-

tions, and that this court was not inclined to \* extend them; that the statute was entitled to the same respect as other statutes, and ought not to be explained away. And from the course of decisions in the state courts, as well as in England, such seems to have been the general impression; and they have been gradually returning to a construction more in accordance with the letter, as well as the spirit and intention of the statute.

In the case referred to, it was laid down as a rule applicable to this question, that an acknowledgment of the original justice of a claim was not sufficient to take the case out of the statute, but the acknowledgment must go to the fact that it was still due. And in *Wetzell v. Bussard*, 11 Wheat. 310, it is held, that the acknowledgment must be unqualified and unconditional, amounting to an admission that the original debt was justly demandable. If the acknowledgments are conditional, they cannot be construed into a revival of the original cause of action, unless that be done on which the revival was made to depend. It may be considered a new promise, for which the old debt is a sufficient consideration, and the plaintiff ought to prove a performance, or a readiness to perform the condition on which the promise was made.

This is the doctrine which prevails in the state courts generally. In New York, it is held that an acknowledgment to take a case out of the statute of limitations, must be of a present subsisting debt. If the acknowledgment be qualified so as to repel the presumption of a promise to pay, it is not sufficient evidence of a promise to pay, so as to prevent the operation of the statute. 15 Johns. 511; 6 Johns. Ch. 266, 290.

This question again, recently, (1828,) came under the consideration of this court, in the case of *Bell v. Morrison*, 1 Pet. 352, and underwent a very elaborate examination; and the leading cases in the English and American courts were reviewed, and the court say, "we adhere to the doctrine in *Wetzell v. Bussard*, and think it the only exposition of the statute which is consistent with its true object

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and import. If the bar is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate."

\*If there be no express promise, but a promise is to be [ \* 93 ] raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances which repel the presumption of a promise or intention to pay, if the expressions be equivocal, vague, and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways, they ought not to go to a jury as evidence of a new promise to revive the cause of action. Any other course would open all the mischiefs, against which the statute was intended to guard innocent persons, and expose them to the danger of being entrapped in careless conversations.

The principle clearly to be deduced from these cases is, that, in addition to the admission of a present subsisting debt, there must be either an express promise to pay, or circumstances from which an implied promise may fairly be presumed.

And this is the conclusion to which the English courts, after a most vacillating course of decisions, had come, before the late act of parliament of George IV. c. 14. This act shows, in a very striking point of view, the sense of that country of the great mischiefs which had resulted from admitting vague and loose declarations, in a great measure to set aside and make void the statute of limitations.

That act (9th May, 1829,) recites that, whereas various questions have arisen in actions founded on simple contract as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operations of said enactments, (statute of limitations,) and it is expedient to prevent such questions, and to make provision for giving effect to the said enactments, and to the intention thereof, be it enacted &c., that in actions of debt, or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of said enactments, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made, or contained by or in \*some writing to be signed by [ \* 94 ] the party chargeable thereby. Martin's Treatise on act 9, Geo. IV.

Although this act can have no direct bearing upon the question

here, it serves to illustrate and confirm the fitness and policy of the course pursued by our courts, in cautiously admitting loose verbal declarations and promises to take a case out of the statute of limitations.

If the doctrine of this court, as laid down in the cases I have referred to, is to govern the one now before us, the facts and circumstances given in evidence fall very far short of taking the case out of the statute of limitations. There is no direct acknowledgment of a present subsisting debt; no express promise to pay; nor any circumstances from which an implied promise may fairly be presumed. The declarations of the defendant below were vague and indeterminate, leading to no certain conclusion, and at best to probable inference only; and indeed, if unexplained by any other evidence, they were senseless. It is left uncertain, even, whether the conversation referred to the note in question. The evidence that this was the only \$500 note of his lying over in the bank, might afford a plausible conjecture that this was the one alluded to. But that is not enough, according to the rule laid down in *Bell v. Morrison*; nor is there any direct admission of a present subsisting debt due. The epithet which accompanied the declaration, would well admit of a contrary conclusion; and that there were some circumstances attending it that would lead him to resist payment. The assertion of his ability to pay is no promise to pay.

The whole declarations, taken together, do not amount either to an explicit promise to pay, made in terms unequivocal and determinate, or disclose circumstances from which an implied promise may fairly be presumed, one or the other of which this court has said is necessary to take the case out of the statute.

The court below therefore erred in not giving the instructions prayed for by the defendant.

The judgment must accordingly be reversed, and the cause sent back, with directions to issue a *venire de novo*.



WILLIAM PEIRSOLL and others, Appellants v. JAMES ELLIOTT and others, Appellees.

6 P. 95.

If a deed is void at law, upon its face, and a bill to have it cancelled is dismissed, the decree ought to show that the court finds no equitable circumstances to induce it to interfere, and should not give costs.

THE case is stated in the opinion of the court.

*Wickliffe*, for the appellants.

*Loughborough*, contra.

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*Peirson v. Elliott. 6 P.*

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MARSHALL, C. J., delivered the opinion of the court.

This is an appeal from a decree of the court of the United States for the 7th circuit and district of Kentucky, dismissing the plaintiffs' bill filed in that court, with costs.

The bill states that the plaintiffs are the heirs and representatives of Sarah G. Elliot, deceased, who departed this life intestate, \*seised of a valuable estate in the county of Woodford, [ \* 96 ] which descended to them. That in her lifetime, in the year 1813, James Elliott, her husband, caused a deed to be made and recorded, purporting to be executed by the said Sarah G. and himself, for the purpose of conveying the said land to Benjamin Elliott, who immediately reconveyed the same to the said James Elliott. The complainants allege, that this deed was never properly executed by their ancestor; that she was induced by the said James to believe, that it conveyed only an estate for her life; that she was prevailed on under this belief to accompany him to the clerk's office, where she acknowledged the said deed without any privy examination, which is required by law. The deed was recorded on her acknowledgment without any certificate of privy examination. The said Sarah G. departed this life in the year 1822, soon after which her heirs brought an ejectment in the circuit court for the recovery of the land. While it was depending, in November, 1823, the said James Elliott, having failed in an attempt to induce the clerk to alter the record, prevailed on the county court of Woodford, on the motion of Benjamin Elliott, to make the following order:—

“ Woodford county, *sct.* November county court, 1823.

“ On motion of Benjamin Elliott, by his attorney, and it appearing to the satisfaction of the court by the indorsement on the deed from James Elliott and wife to him, under date of the 12th of June, 1813, and by parol proof that the said deed was acknowledged in due form of law by Sarah Elliott, before the clerk of this court, on the 11th day of September, 1813, but that the certificate thereof was defectively made out, it is ordered that the said certificate be amended to conform to the provisions of the law in such cases, and that said deed and certificate, as amended, be again recorded; whereupon the said certificate was directed to be amended to read in the words and figures following, to wit:—

“ Woodford county, *sct.* September 11, 1813.

“ This day the within-named James Elliott, and Sarah his wife, appeared before me, the clerk of the court for the county aforesaid, and acknowledged the within indenture to be their act and deed;

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Peirson v Elliott 6 P.

and the said Sarah being first examined privily and apart [ \* 97 ] from her said husband, did declare that she freely and "willingly sealed and delivered said writing, which was then shown and explained to her by me, and wished not to retract it, but consented that it should be recorded." The said deed, order of court, and certificate, as directed to be amended, is all duly recorded in my office.

Teste,

JOHN MCKINNEY, JR., C. W. C. C.

Indorsements on the back of the foregoing deed, to wit: James Elliott *et ux.* to Benjamin Elliott. Deed.

Acknowledged by James Elliott and Sarah G. Elliott, September 11, 1813.

Att.

J. MCKINNEY, JR. C. W. C.

R. B. F. page 199. Recorded deed-book K., pages 56, 57.

Att.

C. H. Mc., D. Clk.

The said James Elliott departed this life during the pendency of the ejectment; it was revived against James Elliott, his son, as terre tenant, and determined in favor of the plaintiffs in November, 1823. The bill, which was filed during the term at which the judgment in ejectment was rendered, alleges that the defendants retain possession of the premises by themselves and their tenants, who are doing great waste by cutting and destroying the timber, and who threaten to continue their possession by suing out a writ of error to the judgment of the court. It charges that the defendants are receiving the rents, which some of them will be unable to repay; prays for an injunction to stay waste; that a receiver may be appointed; that the rents, from the death of Sarah G. Elliott, may be accounted for; that the deed may be surrendered up to be cancelled, and for further relief.

The injunction was awarded.

The writ of error to the judgment of the circuit court came on to be heard in this court, at January term, 1828, 1 Pet. 328, when the judgment was affirmed; this court being of opinion that the deed from James Elliott and Sarah G. his wife, was totally incompetent to convey the title of the said Sarah G. to the tract of land therein mentioned.

In November, 1828, the defendants filed their answer, in which they claim the land in controversy as heirs of James Elliott, deceased. They insist that the deed from James Elliott and Sarah G. his wife, recorded in the court of Woodford county, was fairly and [ \* 98 ] legally executed, and conveyed the "land it purports to convey. That Sarah G. Elliott was privily examined, according

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to law, and that the omission to record her privy examination was the error of the clerk, which was afterwards corrected by order of the court, so as to conform to the truth of the case. They deny that the deed from Sarah G. Elliott was obtained by any misrepresentation; and say, they have heard that the judgment of the circuit court has been affirmed in the supreme court, and that they have not determined to prosecute any other suit, but hope they will be left free on that subject.

In May term, 1829, the cause came on to be heard, when the bill of the plaintiffs was dismissed with costs. They appeal from the decree to this court.

The principal object of the bill was to quiet the title, by removing the cloud hanging over it in consequence of the outstanding deed executed by James Elliott and Sarah G. his wife. This application is resisted in the argument, upon the principle that the deed, having been declared by this court to be void on its face, can do no injury to the plaintiffs, who ought not, therefore, to be countenanced by a court of equity in an application to obtain the surrender of a paper from which they can have nothing to apprehend, by which application the defendants are exposed, without reasonable cause, to unnecessary expense. That under such circumstances a court of equity can have no jurisdiction over the cause.

The court is well satisfied that this would be a proper case for a decree, according to the prayer of the bill, if the defectiveness of the conveyance was not apparent on its face, but was to be proved by extrinsic testimony. The doubt respecting the propriety of the interference of a court of equity, is produced by the facts that the deed is void upon its face, and has been declared to be void by this court. It is, therefore, an unimportant paper, which cannot avail its possessor. The question whether a court of equity ought, in any case, to decree the possessor of such a paper to surrender it, is involved in considerable doubt; and is one on which the chancellors of England seem to have entertained different opinions. Lord Thurlow was rather opposed to the exercise of this jurisdiction, 3 Bro. Ch. 15, 18; and Lord Loughborough appears to have concurred with him, 3 Ves. 368; and in *Gray v. Matthias*, 5 Ves. 286, the court \*of exchequer refused to decree that a bond which was void [ \* 99 ] upon its face should be delivered up, principally on account of the expense of such a remedy in equity, when the defence at law was unquestionable. In this case, Chief Baron McDonald said, that the defendant should have demurred to the action upon that bond. Instead of that, he comes here professing that it is a piece of waste paper. He goes through a whole course of equitable litigation, at

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the expense of two or three hundred pounds. In such a case, though equity may have concurrent jurisdiction, it is not fit in the particular case that equity should entertain the bill.

Lord Eldon inclined to favor the jurisdiction, 7 Ves. 3; 13 Ves. 581. He thought the power to make vexatious demands upon an instrument, as often as the purpose of vexation may urge the party to make them, furnished a reason for decreeing its surrender.

In 1 Johns. Ch. 517, Chancellor Kent concludes a very able review of the cases on this subject with observing: "I am inclined to think, that the weight of authority and the reason of the thing, are equally in favor of the jurisdiction of the court, whether the instrument is or is not void at law, and whether it be void from matter appearing on its face, or from proof taken in the cause, and that these assumed distinctions are not well founded."

The opinion of this learned chancellor is greatly respected by this court. He modifies it in some degree by afterwards saying, "but, while I assert the authority of the court to sustain such bills, I am not to be understood as encouraging applications where the fitness of the exercise of the power of the court is not pretty strongly displayed. Perhaps the cases may all be reconciled on the general principle, that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate; and that the resort to equity to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable nature, or because the defence not arising on its face, may be difficult or uncertain at law, or from some other special circumstance peculiar to the case, and rendering a resort here highly proper, and

clear of all suspicion of any design to promote expense or [ \* 100 ] litigation. If, however, the defect appears \*on the bond itself, the interference of this court will still depend on a question of expediency, and not on a question of jurisdiction."

The court forbears to analyze and compare the various decisions which have been made on this subject in England; because, after considering them, much contrariety of opinion still prevails, both on the general question of jurisdiction, where the instrument is void at law on its face, and on the expediency in this particular case of granting a perpetual injunction, or decreeing the deed to be delivered up and cancelled; and because we think that, although the prayer of the bill be rejected, the decree of dismissal ought to be modified.

The defendants, in their answer, insist upon their title, both at law and in equity, and on being left free to assert that title, if they shall choose so to do. A general dismissal of the bill with costs, the court assigning no reason for that dismissal, may be considered as a

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decree affirming the principles asserted in the answer, as leaving the defendants at full liberty to assert their title in another ejectment, and as giving some countenance to that title.

We also think that the bill ought not to have been dismissed with costs. In addition to the fact that the controversy respecting the title was not abandoned by the defendants, a fact which is entitled to some influence on the question of costs, other considerations bear on this point. The bill prays that the defendants might be enjoined from committing waste whilst they retained possession of the premises; that a receiver might be appointed, and that an account of rents might be taken. These are proper objects of equity jurisdiction. If they had been accomplished when the decree was pronounced, the bill might have been dismissed, but not so far as is disclosed by the record, with costs. The defendants were not, we think, entitled to costs. We are, therefore, of opinion that the decree of the circuit court ought to be so modified as to express the principles on which the bill of the plaintiffs is to be dismissed, and ought to be reversed as respects costs.

7 Wal. 107.

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**LESSEE OF MORDECAI LEVY, ELIZABETH LEVY, CHAPMAN LEVY AND  
ROSINA HIS WIFE, BELLA HART, BELLA COHEN, RHINA MORDECAI,  
FLORA LEVY, AND JACOB HENRY v. PETER MCCARTEE.**

6 P. 102.

In New York, a citizen cannot inherit collaterally from another citizen, when the former must make his pedigree through mediate alien ancestors.

This case is stated in the opinion of the court.

*Hoffman*, for the lessors of the plaintiffs.

*Wirt*, for the defendants.

\* *Story*, J., delivered the opinion of the court.

[ \* 108 ]

This case comes before the court upon a certificate of division of opinion of the judges of the circuit court for the southern district of New York, in a case stated in a special verdict.

Philip Jacobs, an American citizen, died in 1818, seised of certain real estate in the State of New York, having made his last will and testament; but the land in controversy in the present suit (which is an ejectment) is supposed by the plaintiff to be intestate estate. Two of the lessors of the plaintiffs, Bella Cohen and Rhina Mordecai, are citizens of South Carolina, and claim to be the heirs at law of the testator and of his \* posthumous child, and [ \* 109 ] as such are entitled to the premises. They are the children

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of Moses Cohen, who was the son of Leipman Cohen, an alien, and the maternal uncle of the testator, and as such claim to be his next of kin. The mother of the testator (who was also an alien) and the said Leipman Cohen and Moses Cohen are dead. The testator died, leaving his wife pregnant, who was afterwards delivered of a posthumous child, who died in infancy, in 1821, and who took certain estate under the will, not now material to be mentioned. Under these circumstances, the question arises, whether the said lessors of the plaintiffs, notwithstanding the alienage of the intermediate ancestors through whom they make their pedigree, are capable of taking the premises by descent from the testator or his posthumous child, as heirs at law under the laws of New York; and this is the question upon which the judges in the court below were divided in opinion. It resolves itself into this: whether one citizen can inherit in the collateral line to another, when he must make his pedigree or title through a deceased alien ancestor.

The question is one of purely local law, and, as such, must be decided by this court. By the thirty-fifth article of the constitution of New York of 1777, it was ordained and declared "that such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on the 19th of April, 1775, shall be and continue the law of this State, subject to such alterations and provisions as the legislature of this State shall from time to time make concerning the same." By the statute of 11 and 12 William III. c. 6, it is enacted "that all and every person or persons, being the king's natural-born subject or subjects, within any of the king's realms or dominions, shall and may hereafter lawfully inherit and be inheritable as heir or heirs, &c., and make their pedigrees and titles by descent from any of their ancestors, lineal or collateral, although the father and mother, or fathers and mothers, or other ancestor of such person or persons, by, from, through, or under whom he, she, or they shall or may make or derive their title or pedigree, were or was, or is or are, or shall be, born out of the king's allegiance, &c., as freely, &c., as if such father, &c., or other [ \*110 ] \* ancestor, &c., &c., had been naturalized or natural-born subjects, &c."

It has been argued at the bar that this statute of William III, extending to all his subjects within all his dominions, constituted a part of the statute law of England which was in force and formed a part of the law of New York in the year 1775, and as such was recognized by the constitution of New York. But, assuming, for the sake of the argument that this is so, still, the inquiry will remain

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whether it was in force in New York at the time of the present descent cast; for, if it was at that time repealed, it has no bearing on the present case.' By an act of the legislature of New York, passed on the 27th of February, 1788, c. 90, § 38, it is enacted "that none of the statutes of England or Great Britain shall be considered as laws of this State." And by the statute of descents of New York of the 23d of February, 1786, c. 12, it is enacted "that in all cases of descents not particularly provided for by this act, the common law shall govern." These statutes were in full force at the time of the descent cast in the present case, and, of course, govern the rights of the parties.

It has been argued that the reference to the common law, in the statute of descents of 1786, includes not only the common law, properly so called, but the alterations and amendments which had been made in it by British statutes antecedent to the American Revolution; and that the repeal of the British statutes, by the act of 1788, repealed them only as statutes, but left them in full vigor and operation so far as they then constituted a part of the law of New York; thus making them in some sort a part of its common law. We cannot yield to the argument, in either respect. The legislature must be presumed to use words in their known and ordinary signification, unless that sense be repelled by the context. The common law is constantly and generally used in contradistinction to statute law. This very distinction is pointed out in the clause of the constitution of New York already cited: "Such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts, &c., which did form the law of the said colony on the 19th of April, 1775, shall continue the law of the State." It is too plain for argument that the common law is here spoken of in its appropriate sense, as the unwritten \*law of the land, inde- [ \* 111 ] pendent of statutable enactments. The same meaning must be applied to it in the act respecting descents of 1786. That act propounds a scheme of descents varying in many respects from the common law, and then provides that, in all cases of descent not provided for by the act, the common law shall govern. If it had been intended to recognize any statute enactments of England, we should naturally expect to find some clear expression of such an intention by some appropriate words. None such are given, and it is therefore not to be doubted that the common-law canons of descent were referred to, and made the basis of descent in all cases not otherwise positively provided for. In England, the canons of descent by the common law are never confounded with descents specially authorized by statute; and the statute of New York refers not to any peculiar law of

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that State then existing, but to the common origin of our jurisprudence, the common law of England.

There is still less reason for giving the meaning contended for to the repealing clause of the act of 1788, for that would be a plain departure from the very words of the act, without any necessity for such a construction. The words are "that none of the statutes of England, &c., shall be considered as laws of this State." The "statutes of England" can mean nothing else but the acts of parliament. The object was not to repeal some existing laws, but to repeal laws then in force in New York. It would be almost absurd to suppose that the act meant to repeal the statutes of England, which had no operation whatever in that State. What were the British statutes then in force? Plainly, those referred to and continued in force by the thirty-fifth article of the constitution, already quoted. The repeal, then, was coextensive with the original adoption of them. In any other view of the matter, this extraordinary consequence would follow, that the legislature could solemnly perform the vain act of repealing, as statutes, what, in the same breath, it confirmed as the common law of the State; that it would propose a useless ceremony, and, by words of repeal, would intend to preserve all the existing laws in full force. And this, it may be added, it would be doing at the same time by contemporaneous legislation, at the same session, as well as in the same act it was revising, and in [ \* 112 ] incorporating into the text \* of its own laws many of the provisions of the old English statutes, which had previously been, by adoption, a part of its jurisprudence. Such a course of proceeding would be consistent and intelligible, and in harmony with a design to repeal all the English statutes which were not revised and reenacted; but it would be unintelligible and inconsistent with a design to retain them all as a part of its own common law.

We think, then, that the statute of William III. constituted no part of the law of New York at the time when the present descent was cast, and that the case must rest for its decision exclusively upon the principles of the common law. The residue of this opinion will, therefore, be exclusively confined to the consideration of the common law applicable to it.

In order to clear the way for a more exact consideration of the subject, it may be proper to take notice of some few distinctions in regard to descents, which are of frequent occurrence in the authorities. Descents are, as is well known, of two sorts: lineal, as from father or grandfather to son or grandson, and collateral as from brother to brother, and cousin to cousin, &c. They are also distinguished into mediate and immediate descents. But here the terms are sus-

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ceptible of different interpretations, which circumstance has introduced some confusion into legal discussions, since different judges have used them in different senses. A descent may be said to be mediate or immediate, in regard to the mediate or immediate descent of the estate or right; or it may be said to be mediate or immediate in regard to the mediateness or immediateness of the pedigree, or degrees of consanguinity. Thus, a descent from the grandfather, who dies in possession, to the grandchild, (the father being then dead,) or from the uncle to the nephew, (the brother being dead,) is in the former sense in law an immediate descent, although the one is collateral and the other lineal, for the heir is in the *per*, and not in the *per* and *cui*. And this, in the opinion of Lord Chief Justice Bridgeman, Collingwood *v.* Pace, Bannister's Rep. of Sir O. Bridgeman, 410, 418, is the true meaning and appreciation of the terms. So they are used by Lord Coke, in his first Institute, Co. Litt. 10, b. On the other hand, with reference to the line of pedigree or consanguinity, a descent is often said to be immediate when the ancestor from whom the party derives his blood is immediate [ \* 113 ] and without any intervening link or degrees, and mediate when the kindred is derived from him *mediante altero*, another ancestor intervening between them. Thus, a descent in lineals from father to son is, in this sense, immediate; but a descent from grandfather to grandson, (the father being dead,) or from uncle to nephew, (the brother being dead,) is deemed mediate, the father and the brother being in these latter cases the *medium deferens*, as it is called, of the descent or consanguinity. And this is the sense in which Lord Hale uses the words, assigning as a reason that he calls it a mediate descent because the father or brother is the medium through or by whom the son or nephew derives his title to the grandfather or uncle. Collingwood *v.* Pace, 1 Vent. 413, 415; s. c. 1 Keble, 671. And in this sense the words are equivalent to mediate and immediate ancestors. In the great case of Collingwood *v.* Pace, upon which we shall hereafter comment at large, these distinctions were insisted on by the learned judges already referred to with much particularity, and they will help us to understand the reasoning of the court with more readiness and accuracy. We shall constantly use the words in the sense adopted by Lord Hale.

That an alien has no inheritable blood, and can neither take land himself by descent, nor transmit land from himself to others by descent, is common learning, and requires no reasoning to support it. If we were to trust to the doctrines promulgated by elementary writers, it is no less true that alienage in any mediate ancestor will interrupt the descent between persons who are capable of taking and

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transmitting land by descent. It is so laid down in Comyn's Digest (Alien C. 1.,) a work of rare excellence and accuracy, and in Bacon's Abridgment (Alien C.) ; and it is implied in the text of Blackstone's Commentaries, (2 Black. Comm. 250,) where the only exception admitted is of a descent from brother to brother. Lord Coke, in his First Institute, Co. Litt. 8, a, says, that "if an alien cometh into England and hath issue two sons, these two sons are *indigenæ*, subjects born, because they are born within the realm; and yet if one of them purchase lands in fee and dieth without issue, his brother shall not be his heir, for there was never [ \* 114 ] any inheritable blood between the father and them ; " and where the sons, by no possibility, can be heirs to the father, the one of them shall not be heir to the other." The case put by Lord Coke, of a descent from brother to brother, afterwards became an exceedingly vexed question, and was finally resolved, in the case of Collingwood *v.* Pace, in favor of the descent from brother to brother, by seven judges against three, on deliberate argument before all the judges in the exchequer chamber, upon an adjournment of the cause from the common pleas. All the judges gave *seriatim* opinions; but the whole case turned upon the point, whether the descent was to be considered as mediate or immediate. Three judges (Lord Chief Justice Bridgman, and Tyrrel, J., and Keeling, J.,) were of opinion that the descent from brother to brother was not immediate but mediate through the father (*mediante patre*), the other judges were of opinion that by the common law the descent from brother to brother was immediate, and not through the father, as a *medium deferens*. The case is reported in various books, and in all of them, considering its magnitude and importance, in a very imperfect and unsatisfactory manner. The original arguments and opinions in the common pleas are given in 1 Keble's Reports, 65; and in the exchequer chamber, in 1 Keble, 174, *et seq.* 216, 265, 538, 579, 585, 603, 670, 699; in 1 Siderfin's Rep. 193; and very briefly in 1 Levin's Rep. 59; S. C. Hard. Rep. 224. The opinion of Lord Hale is reported at large in 1 Ventris's Rep. 413; and Mr. Bannister, in his excellent edition of the judgments of Lord Chief Justice Bridgman, (Bannister's Rep. 410, 414,) has recently, and for the first time, given us the opinion of this eminent judge from his own manuscript. It is a most luminous and profound argument, and contains a large survey of the whole doctrine of alienage. In this opinion the special verdict is set forth, and thus gets us rid of some of the obscurities thrown upon it in the former reports. The substance of the facts is as follows: Robert Ramsay, an alien, born in Scotland, before the accession of the crown of England to king James,

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had issue four sons, aliens, namely : Robert, Nicholas, John, afterwards Earl of Inchderness, and naturalized by an act of parliament, in 1 Jac. I., and George, naturalized by an act of parliament, 7 Jac. I., who afterwards had issue John, the plaintiff's lessor, born in England. Nicholas had issue Patrick, born in England, in \* 1618, who had issue William, born in England, who was [ \* 115 ] then living. John, the earl, having purchased the rectory of Kingston, in question in the case, died seised thereof, without issue, in January, 1 Car. I., (1625.) Afterwards, in July, 1636, George died, leaving issue the said John, the lessor of the plaintiff; afterwards, in May, 1638, Nicholas died, leaving the said Patrick his only son living. It did not appear when Robert the eldest son died; but he left three daughters, all aliens born, then living. The question was, whether John, the lessor of the plaintiff, the son of George, would take the premises as heir by descent to the earl his uncle, or for want of an heir the rectory should escheat to the crown. In the argument of the case by the judges, we are informed, both by Lord Hale and Lord Bridgeman, that three things were agreed to as unquestionable by all of them. 1. That neither the daughters of Robert, the son of Robert, being aliens, nor Patrick, the son of Nicholas, though born in England, can inherit, because his father, through whom he must convey his pedigree, was an alien. 2. That as the estate cannot descend to them, so neither do any of them stand in the way to hinder the descent to George. The difference hath been often put between the case of a son or brother, aliens, who are in law as non-existentes, and the brother or son of a person attainted, as to this point. 3. That there is no difference between the descent to George and the descent to John his son, the lessor of the plaintiff, who, *jure representationis*, is the same with the father. If George, having survived John, the earl, might have inherited the estate, so will John, the son, who represents him. So that the point of the case came to this, whether, if two brothers of alien parents, one naturalized by acts of parliament, and the one purchaseth lands and dies, the lands shall descend to the other. And so it is put by Lord Bridgeman and Lord Hale.

In regard to Patrick, the son of Nicholas, it is material to observe, that as Nicholas survived John, the earl, he would, except for his being an alien, have been capable to inherit the latter. But, being alive, he would intercept the descent to Patrick, who was a native born subject, according to the principles of the common law stated by this court in M'Creery v. Somerville, 9 Wheat. 354. The learned judges, however, in Collingwood v. Pace, take no particular notice of the "fact that Nicholas was living at the [ \* 116 ]

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death of John, the earl; but treat the case exactly in the same manner as if he had been then dead, and apparently rely on no distinction as arising from that fact. But George, the brother of John, the earl, survived him, and being a naturalized subject was capable of taking by descent from him, unless the alienage of his father Robert (whether dead or living) interrupted the descent; and John, the lessor of the plaintiff, *jure representationis*, derived his title directly from his father.

Having stated these preliminaries, which are necessary for a more clear understanding of the case, it may be added, that the case furnishes conclusive evidence that, by the common law, in all cases of mediate descents, if any mediate ancestor through whom the party makes his pedigree as heir, is an alien, that is a bar to his title as heir, for the reasons stated by Lord Coke, that such an alien ancestor can communicate no inheritable blood. This was admitted by all the judges, as well by those who were in favor of the lessor of the plaintiff, as by those who argued the other way. It was necessarily the doctrine of the latter, for they held the alienage of the father a good bar to the descent, deeming a descent from brother to brother to be a mediate descent only, *mediante patre*; on the other hand, the seven judges who were for the lessor of the plaintiff admitted the general doctrine, but contended that it did not apply to the case of a descent from brother to brother, because it was an immediate descent. And this constituted the whole controversy between them, that is, whether the descent was mediate or immediate. It will be our business to demonstrate this by passages from the opinions of Lord Bridgman and Lord Hale, who took opposite sides in the argument. Their opinions are given at large, and in an authentic form; those of the other judges who agreed with them respectively are given by the reporters in a very abridged and loose manner, but all of them manifestly assume the same general basis of reasoning on this point, as will appear by referring to their opinions in 2 Siderfin, 193, and 1 Keble, 579, 585, 603, 670, 699.

In the first place we will begin with Lord Hale. He says: "In immediate descents there can be no impediment but what [ \* 117 ] arises in the parties themselves. For instance, the \*father seised of lands, the impediment that hinders the descent must be either in the father or the son, as if the father or the son be attaint or an alien. In mediate" (printed immediate by mistake, as the context shows) "descents, a disability of being an alien, or attaint in him, that I call a medius ancestor, will disable a person to take by descent, though he himself hath no such disability. For instance, in lineal descents, if a father be attaint or be an alien, and

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bath issue a denizen born, and dies in the life of the grandfather, the grandfather dies seised, the son shall not take, but the land shall escheat. In collateral descents, A and B brothers; A is an alien or attainted, and hath issue to a denizen born; B purchaseth lands and dies without issue; C shall not inherit; for A, which was the medius ancestor, or *medium deferens* of this descent, was incapable. And this is very apparent in this very case, for by this means Patrick, though a denizen born, and the son of an elder brother, is disabled to inherit the earl. A and B brothers; A is an alien or person attainted, and hath issue C, and dies, and C purchaseth lands and dies without issue; B, his uncle, shall not inherit for the reason before-going; for A is a medius, which was disabled. And if in our case Patrick, the son of Nicholas, although a denizen born, had purchased lands and died without issue, John, his uncle, should not have inherited him, by reason of the disability of Nicholas; and yet Nicholas himself, had he not been an alien, could not immediately have inherited to his son, but yet he is a block in the way of John." *Collingwood v. Pace*, 1 Vent. 415, 416; S. P. Ib. 419, 423; see also S. C. 1 Keble, 671, &c. These passages distinctly establish the doctrine contended for in all cases of mediate descents, in the sense given to these terms by Lord Hale; that is, that an alien mediate ancestor, through whom the party must claim, is a bar to the descent. The cases put, of a descent from grandfather to grandson, the father being an alien and dead, and of a descent from an uncle to a nephew, the brother being an alien and dead, are direct to the point, and are put as unquestionable. Lord Hale also cites, in illustration "of this doctrine, Grey's case, Dyer 274, and Courtney's [ \*118 ] case, cited 1 Vent. 425; Bannister, 452. Both of these were cases of attaint in the mediate ancestor creating an incapacity to inherit; and although in some cases there is a difference between alienage and attaint, where the claim is not through the ancestor, yet where the claim is through him there is no difference. The disability equally applies to each, and breaks the inheritance. Lord Hale takes notice of this distinction in another part of his argument, in speaking of the disability of an alien, which is general or original to himself in reference to inheritance; and where it is a consequential or consecutive disability that reflects to an alien, from one that must derive by or through him, though he perchance be a natural-born subject. Thus he says: "In respect to this incapacity (personal), he doth resemble a personal attaint, yet with this difference. The law looks upon a person attaint as one that it takes notice of, and therefore the eldest son attaint, overliving his father, though he shall not take by descent in respect of his disability, yet he shall

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hinder the descent of the younger son. But if the eldest son be an alien the law takes no notice of him; and, therefore, as he shall not take by descent, so he shall not impede the descent to his younger brother. A consequential consecutive disability, that reflects to an alien from one that must derive by or through him, though he perchance be a natural-born subject (doth impede). As in our case, though Patrick the son of Nicholas be a natural-born subject, yet because Nicholas his father was an alien, there is a consecutive impediment derived upon Patrick whereby he is consequentially disabled to inherit John his uncle; and this consecutive disability is parallel to that which we call corruption of blood, which is a consequent of attainer. If the father be attainted, the blood of the grandfather is not corrupted; no, nor the blood of his son, though he could not inherit him, but only the blood of the father. But that corruption of blood in the father draws a consequential impediment upon the son to inherit the grandfather, because the father's corruption of blood obstructs the transmission of the hereditary descent between the grandfather and the son." 1 Vent. 417, 418.

[ \* 119 ] \*Lord Hale afterwards proceeds to state the reasons why, notwithstanding the general rule, he was of opinion that in the case at bar, George, and by parity of reasoning, his son John, the lessor of the plaintiff, could inherit to the earl. "My first reason," says he, "is because the descent, from brother to brother, though it be a collateral descent, yet it is an immediate descent; and consequently, upon what has been premised at first, unless we can find a disability or impediment in them, no impediment in another ancestor will hinder the descent between them." 1 Vent. 423. He then proceeds to establish his doctrine, that it is an immediate descent, and that in this respect it differs from all other collateral descents whatsoever. He then adds: "If the father, in case of a descent between brothers, were such an ancestor as the law looks upon as a medium that derives the one descent from the other, then the attainer of the father would hinder the descent between the brothers. But the attainer of the father doth not hinder the descent between the brothers; therefore the father is not such a medium or *nexus* as is looked upon by law as the means deriving such descent between the two brothers." 1 Vent. 425.

These passages from Lord Hale's opinion have been cited the more at large, because they afford a satisfactory answer to the argument at the bar, as to the incongruity and inconclusiveness of his reasoning, and establish beyond controversy, that, in his opinion, the common law interrupted the descent wherever a mediate ancestor was either an alien or attaint; and that the case of a descent from

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brother to brother was excepted because the descent was immediate.

Let us now proceed, in the next place, to the opinion of Lord Bridgman. He begins by stating the very same proposition as Lord Hale. "It hath been inferred," says he, "that in immediate descents there can be no impediment but what ariseth in the parties themselves. But in mediate descents, it is agreed, the disability of being an alien, or attainted in him that is the *medius antecessor*, will disable the other, though he have no such disability. And therefore Patrick here, though born in England, cannot inherit John his uncle, nor John to him, by reason of the disability of Nicholas, the *medius antecessor*. But it is said that the descent from brother to brother, \*though it be a collateral descent, yet it is an im- [ \*120 ] mediate descent, and so no impediment could hinder a descent between them. Bannister, 418, 436. And the whole of his argument is then employed in an attempt to disprove that the descent between brothers is by the common law immediate, and in affirming the doctrine of Lord Coke in Co. Litt. 8 a. for the same reason, namely: there is no inheritable blood between them, otherwise than *mediante patre*. Bannister, 437, 442, 443, 445, 460. It is unnecessary to go over that reasoning, because it proceeds upon the ground as conceded and clearly established in the common law, there can be no title made by descent, where there is a mediate alien ancestor, unless it be the case of a descent from brother to brother.

The case of Collingwood *v.* Pace, then, does conclusively establish the doctrine of the common law to be, by the admission of all the judges, that if the pedigree must be traced through a mediate alien ancestor, the party cannot take by descent, for the inheritable blood is stopped, and there is a flat bar to the assertion of any title derived through the alien; so that the elementary writers are fully borne out in their assertions on this subject. See Com. Dig. Alien, C; Bac. Abridg. Alien C; Cruise's Dig. tit. 29, c. 2, § 20; York on Forfeiture, 72; 3 Salk. 129; Doe d. Durore *v.* Jones, 4 Term Rep. 300.

The preamble to the statute of 11 and 12 William III. c. 6, also affords strong evidence of the antecedent state of the law on this point; and that the statute is remedial, and not, as has been argued at the bar, in any respect declaratory. It is in the following words: "Whereas divers persons born within the king's dominions are disabled to inherit, and make their titles by descent from their ancestors, by reason that their father or mother, or some other ancestor by whom they are to derive their descent, was an alien, and not born within the king's dominions, for remedy whereof," &c.

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Here, the disability to inherit and make title is plainly stated to exist; not that there is a doubt upon the subject; and the disability is stated to arise from the fact, that the ancestor by whom they are to derive their descent is an alien; not that the ancestor from whom [ \* 121 ] they derive their title to the estate is an alien; and a remedy is therefore provided to meet that which \* was deemed the only inconvenience, a descent through a mediate alien ancestor.

Upon the clear result, then, of the English authorities, we should be of opinion, even if there were no further lights on the subject, that the alienage of the mediate ancestors in the present case, would be a bar to the recovery of the plaintiff. But the same doctrine will be found fully recognized by Mr. Chancellor Kent, in his learned commentaries, with the additional declaration, that the statute of William III. had never been adopted in New York; though he very properly admits that the enlarged policy of the present day would naturally incline us to a benignant interpretation of the law of descents, in favor of natural-born citizens, who were obliged to deduce a title to land from a pure and legitimate source, through an alien ancestor. 2 Kent's Comm. 47, 48, 49. See also *Jackson v. Lunn*, 3 Johns. Cas. 109, 121. The case of *Jackson v. Wood*, 7 Johns. 290, 297, has not the slightest bearing on the subject. It decided no more than that an Indian was incapable of passing a title to lands in New York, without the consent of the legislature; or in any other manner than is provided for by the laws of the State. The case of *Jackson v. Jackson*, 7 Johns. 214, turned upon the known distinction, that an alien who cannot inherit, shall not prevent the descent to a citizen who can make title as heir, not through the alien, but aside from him; as in the common case in England, of a younger brother inheriting from his father, though he has an elder brother living who is an alien.

But there is a very recent decision in the State of New York, not yet in print, which is direct to the point now before us. It is the case of *Jackson v. Green*, decided by the supreme court of that State in 1831. 7 Wend. 333. We have been favored with a manuscript copy of the opinion delivered by the court on that occasion. The question in that case was, whether one naturalized citizen could take by descent from another naturalized citizen, who was his cousin; the pedigree being to be made through alien ancestors. It was held that he could not. The court fully recognized the distinction already adverted to between mediate and immediate descents; holding that an alien ancestor, through whom the pedigree must be traced, intercepted the descent, and produced a fatal bar to the recovery.

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\* A certificate will be sent to the circuit court, that the [ \* 122 ] lessors of the plaintiff, Bella Cohen and Rhina Mordecai, were not capable of taking by descent the premises described in the special verdict in the case, whereof the said Philip Jacobs died seised, as therein stated, as heirs at law of the said Philip Jacobs, by reason of the alienage of the mother of the said Philip Jacobs, and his maternal uncle, Leipman Cohen, and their father; the lessors of the plaintiff deriving their pedigree and title by descent through mediate alien ancestors. Certificate accordingly.

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LESSEE OF STEPHEN SICARD *et al.*, Plaintiffs in Error, v. NANCY DAVIS *et al.*, Defendants in Error. SAME v. JOHN CECIL AND ROBERT SMITHERS.

6 P. 124.

In Kentucky, a deed not acknowledged or recorded, passes the title as against all the world except creditors of the grantor, and purchasers from him without notice.

What circumstances may be sufficient presumptive proof of the execution and delivery of a lost deed.

A possession under a junior patent, which interferes with a senior patent, the lands being wholly unoccupied by any one claiming under the latter, extends by construction to the whole tract.

If a party amend his declaration in ejectment by inserting a new count, laying a demise from a different lessor, the statute of limitations, as against this new title, continues to run till the amendment is made. And if the adverse possession had then been held more than twenty years, and more than ten years since the death of the plaintiff's ancestor, it is a bar.

THE case is stated in the opinion of the court.

*Sergeant*, for the plaintiff.

*Wickliffe*, contra.

\* MARSHALL, C. J., delivered the opinion of the court. [ \* 130 ]

This is a writ of error to a judgment in ejectment brought by the plaintiffs in error against the defendants, in the court of the United States for the seventh circuit and district of Kentucky. The declaration was delivered to the defendants in March, 1815. The declaration contains a single count on the demise of Stephen Sicard.

In November term, 1821, the plaintiff obtained leave to \* amend his declaration, by laying a demise in the names [ \* 131 ] of the heirs of the original grantee of the commonwealth, or intermediate grantees; which amended declaration was filed. The issues were joined in the usual form, and a jury sworn, who found a verdict for the defendants, on which judgment was rendered by the court.

At the trial, the plaintiff gave in evidence to the jury the patent to

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Joseph Phillips, and proved that it covered the land in controversy, and that the defendants were in adverse possession at the time of the commencement of this suit. He also offered in evidence copies of deeds which purported to convey the title from the patentee to Benjamin Stephens, from Stephens to Samuel Robert Marshall, and from Marshall to the plaintiff. The deed from Phillips to Stephens, dated the 16th day of October, 1797, is attested by three subscribing witnesses, and the deed from Stephens to Marshall, dated the 25th day of December, 1797, is attested by two subscribing witnesses. Each deed was proved by one of the subscribing witnesses thereto, in June, 1798, before Hilary Baker, mayor of the city of Philadelphia, who gave his official certificate thereof in the usual form. The deed from Marshall to the plaintiff, Sicard, dated the 25th day of May, 1798, is attested by two subscribing witnesses, and is acknowledged by the grantor before the mayor of Philadelphia, in July, 1798, who has given his official certificate thereof. These deeds were admitted to record on this testimony, in April, 1803, in the court of appeals in Kentucky.

To prove the loss of the originals, the plaintiff produced the receipt of Alexander Parker, dated the 9th of February, 1803, acknowledging the receipt of the said deeds, for the purpose of being recorded in the office at Frankfort, in Kentucky; also the affidavit of the said Parker, stating his receipt, and the purpose for which the deeds were delivered to him; as also that he had caused them to be recorded. Some time after this, being admitted to record, he was directed by Sicard to send them to him in Philadelphia. Some time before August, 1804, he applied to Thomas Wallace to carry them, who undertook to do so, and directed him to leave them with the clerk of the said

Wallace that evening. The affiant inclosed the three deeds [ \* 132 ] in a sheet of paper directed to the said Sicard, \* which he delivered that evening to the said Wallace's clerk, he believes William Scott, who promised to deliver them to the said Wallace. The affiant has never seen them since, but has heard that they were lost. He believes the deeds to have been originals. He paid the taxes on said 6,680 acres of land for several years, and saw it entered for taxation in the auditor's office. He believes that the said William Scott departed this life twelve or fifteen years ago. The plaintiff also produced the affidavit or deposition of Thomas Wallace, who proved that Mr. Alexander Parker did say, that in the summer of 1803 he left at the store, or delivered to a young man, (probably Mr. Scott,) then living with the deponent, sundry papers, said to be deeds, the property of the said Sicard, to be carried from Lexington to Philadelphia by the deponent. He knows nothing of the papers, nor does he recollect ever to have seen them. He has searched for

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them among his papers, but cannot find them. He verily believes they were not delivered to him.

The plaintiff also produced the deposition of Mary Powell, widow of Benjamin Powell, one of the subscribing witnesses to the deed from Benjamin Stephens to Samuel Robert Marshall, who deposed that she understood from her husband that he had witnessed a deed from Stephens to Marshall; that he had been dead about two years. Some time previous to his death, he accompanied the plaintiff, Sicard for the purpose of attesting the fact of his having subscribed the said deed as a witness; and from several conversations which passed between the said Sicard and her husband, in her presence, she is convinced her husband had a perfect recollection of having subscribed his name as a witness to the said deed. Also the deposition of Joseph Spencer, the subscribing witness to the deed from Phillips to Stephens, who proved the same before the mayor of Philadelphia, in June, 1798, who says that he has some recollection of having witnessed an instrument of writing supposed by him to be a conveyance of land, he knew not to whom granted, at the house of Jonathan Phillips, deceased, of Maidenhead, now Lawrence township, Hunterdon county, State of New Jersey, some twenty years ago or more (this deposition was taken in April, 1822,) and of his meeting again one or more of the family, he believes Dr. Joseph Phillips, of that place or neighborhood, \* was one, in the city of [ \* 133 ] Philadelphia, at the office of Hilary Baker, who was then mayor of the said city, to authenticate the handwriting to the said instrument of conveyance, as party or witness, or both; but has no certain date in his memory whereby he can be more particular. Also the deposition of George Heyl, notary public of Philadelphia, who says that he was called on in his official capacity, on the 17th of January, 1803, to certify and attest to three several copies of original deeds, one from Joseph Phillips to Benjamin Stephens, one from Stephens to Samuel Robert Marshall, and the third from Marshall to Stephen Sicard, dated the 25th of May, 1798, all for a tract of land lying and being, &c., containing 6,680 acres; and that he did, at the request of Stephen Sicard, examine and compare the said three several copies with the original deeds submitted to him by the said Stephen Sicard for that purpose, and found them to be true and faithful copies of the same; that the said deeds appeared to him, in every respect, originals, fair and genuine papers, the parchment, ink, signatures, &c., wearing that aspect. That the said Stephen Sicard told him at the time that his motive for requiring notarial copies of said originals was that he was going to send said originals to Kentucky to be recorded. That the said deponent had a knowledge of

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the signature of Hilary Baker, the mayor of the city, before whom they were proved, and of the seal of the city, and believed them genuine; that in the spring of the year 1818, the said Stephen Sicard again called on him, and took his deposition before Alderman Douglass to the above fact, to which deposition were annexed the said three notarial copies.

The notarial copies mentioned in the foregoing deposition agree with the copies from the record of the court of appeals of Kentucky.

The plaintiff also offered as a witness the clerk of the court of appeals, who deposed that the deeds had been recorded by Thomas S. Hinde, his deputy, now living beyond the reach of the process of this court; but he recollects to have noticed them at the time, and they had, so far as he recollects, every appearance of genuine documents. The plaintiff also introduced Ralph Phillips, who stated that he was

long acquainted with Joseph Phillips, and Stephens, and [ \* 134 ] Marshall, and he \* heard them speak of the conveyance of the tract of land in controversy, as made by Phillips to Stephens, and by Stephens to Marshall, many years ago; but he does not recollect to have seen the deeds.

The defendants gave in evidence patents of the commonwealth of junior date to that of the plaintiff; proved the boundaries of those junior grants, and that they included the defendants; and gave evidence that they had settled under faith of those junior grants, and held adversely to the patent offered in evidence by the plaintiff.

On motion of the defendants, the court rejected the copies of the deeds aforesaid, from Phillips to Stephens, and from Stephens to Marshall, and from Marshall to Sicard; because there was no proof of the execution of the deeds from Phillips to Stephens, or from Stephens to Marshall, so as to let in copies of the original deeds.

The defendants then proved that in the year 1794, they had adverse possession of the land in controversy, and had continued ever since to hold it adversely. Whereupon the defendants moved the court to instruct the jury:—

1. That the plaintiff has given no evidence to support the first count on the demise of Sicard, and none to support the demise from any of the other lessors, except such as are heirs of Joseph Phillips, the patentee.

2. That if the jury find from the evidence that the patents of Joseph Phillips and William Loving do interfere and lap, as represented in the connected plat, and that the defendants and those under whom they hold did enter, claiming under said Loving's survey, and took the first possession within the said interference, the said patent of Joseph Phillips being (at the date of such patent and possession taker

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under Loving's patent) unoccupied by any person holding or claiming under said Phillips's patent, then and in that case the possession of the defendants so taken was not limited to their actual inclosure, but was coextensive with the boundaries by which they claimed.

3. That if the jury find from the evidence that the possession of the lands in controversy was taken in the lifetime of Joseph Phillips, the ancestor of the lessors of the plaintiff, and adversely to said Phillips, and that the defendants and those \* under [ \* 135 ] whom they hold, have continued to hold adversely to said Phillips, the ancestor, and his heirs ever since, and for more than twenty years before the 17th of January, 1822, when the second count in the declaration was filed, and shall moreover find that said ancestor, Joseph Phillips, died more than ten years before the said 17th of January, 1822, when the second count was filed, then the said lessors, the heirs of Joseph Phillips, are barred by the statute of limitations; which instructions were given accordingly; to each of which instructions, as well in excluding the deeds as in instructing the jury, the plaintiffs excepted.

The first exception is to the refusal of the court to permit the copies of deeds offered by the plaintiff to be given in evidence to the jury. These copies were rejected "because there was no proof of the execution of the deeds from Phillips to Stephens, or from Stephens to Marshall." This objection would have applied to the originals as strongly as to the copies; consequently, we must inquire whether the plaintiff offered such evidence of the execution of the originals as is required by law.

In 1796, the legislature of Kentucky passed a law respecting conveyances, the 1st section of which enacts, "that no estate of inheritance or freehold, or for a term of more than five years, in lands or tenements, shall be conveyed from one to another, unless the conveyance be declared by writing, sealed and delivered; nor shall such conveyance be good against a purchaser for a valuable consideration, not having notice thereof, or any creditor, unless the same writing be acknowledged by the party or parties who shall have sealed and delivered it, or be proved by three witnesses to be his, her, or their act, in the office of the clerk of the court of appeals of a district court, or in a court of quarter sessions or county court, in the manner prescribed by law, or in the manner hereinafter directed, within eight months after the time of sealing and delivering, and be lodged with the clerk of such court to be there recorded."

The 3d section enacts that "if the party who shall sign and seal any such writing, reside not in this commonwealth, the acknowledgment by such party, or the proof by the number of witnesses requisite,

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of the sealing and delivering of the writing, before any court [ \* 136 ] of law, or the mayor or other chief magistrate of any city, town, or corporation of the county in which the party shall dwell, certified by such court, or mayor, or chief magistrate, in the manner such acts are usually authenticated by them, and offered to the proper court to be recorded within eight months after the sealing and delivering, shall be as effectual as if it had been in the last-mentioned court."

This act reduces into one the laws previously existing on this subject. It does not create a right to convey property which any individual may possess, but restrains that right by certain rules which it prescribes, and which are deemed necessary for the public security. The original right to transfer property remains unimpaired, except so far as it is abridged by the statute.

How far does the statute restrain an individual in the exercise of this general original right?

The words are, "that no estate of inheritance, &c., in lands or tenements, shall be conveyed from one to another, unless the conveyance be declared by writing, sealed and delivered."

The only requisites then to a valid conveyance of an estate of inheritance in lands are, that it shall be in writing, and shall be sealed and delivered.

The statute proceeds, "nor shall such conveyance be good against a purchaser for a valuable consideration, not having notice thereof, or any creditor, unless the same writing be acknowledged." &c.

The acknowledgment or the proof which may authorize the admission of the deed to record, and the recording thereof, are provisions which the law makes for the security of creditors and purchasers. They are essential to the validity of the deed, as to persons of that description, not as to the grantor. His estate passes out of him and vests in the grantee, so far as respects himself, as entirely, if the deed be in writing, sealed and delivered, as if it be also acknowledged or attested and proved by three subscribing witnesses, and recorded in the proper court. In a suit between them, such a deed is completely executed, and would be conclusive, although never admitted to record, nor attested by any subscribing witness. Proof of sealing and delivery would alone be required, and the acknowledgment of the fact by the party, would be sufficient proof of it.

[ \* 137 ] \* If the original deed remained in existence, proof of the handwriting, added to its being in possession of the grantee, would, it is presumed, be *prima facie* evidence that it was sealed and delivered. No reason is perceived why such evidence should not be as satisfactory in the case of a deed as in the case of a bond. But

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the deed is lost, and positive proof of the handwriting is not to be expected or required. The grantee must depend on other proof.

The deed purports to have been executed more than thirty years past. The mayor of Philadelphia, the person entrusted by law with receiving and certifying the acknowledgment or proof of the deed, has certified in legal form that it was proved to him by one of the subscribing witnesses. Had it been also proved by the other two, the probate would have been sufficient; not only as against the party, but as against purchasers and creditors. It has remained from the time of its execution until its loss, in the possession of those claiming title under it; and in the long course of time which has elapsed since its alleged execution, the grantor has never controverted its existence, nor set up any title to the property it purported to convey. Parker, the agent of the plaintiff, respecting this transaction, as is presumed, though not averred in terms, from the facts that he brought the deeds from Philadelphia, procured them to be recorded, and took measures for returning them to him, says that he saw them entered for taxation in the auditor's office, and paid the taxes on them for several years. Samuel Robert Marshall, the grantee of Stephens, and who conveyed the land afterwards to Sicard, by a deed regularly authenticated and recorded, which recites the deed from Phillips, and conveys the land with general warranty, is a subscribing witness to that executed by Phillips. The notary, who at the instance of Sicard took notarial copies before the deeds were transmitted to Kentucky to be recorded, deposes that the appearance of the originals was perfectly fair.

Add to these strong circumstances, the testimony which after the long lapse of time the plaintiff has been enabled to procure. Phillips and Stephens have been long dead; Marshall has conveyed the land to Sicard with a general warranty, by a deed regularly authenticated and recorded, and is of course, if alive, disqualified as a witness. One witness deposes that he was \*long ac- [ \* 138 ] quainted with Joseph Phillips and Stephens and Marshall, that he heard them speak of the conveyance of the tract of land in controversy as made by Phillips to Stephens, and by Stephens to Marshall. Joseph Spencer, the subscribing witness to the deed made by Phillips, who proved its execution before the mayor of Philadelphia, has some recollection of having witnessed an instrument of writing, supposed by him to be a conveyance of land, at the house of Jonathan Phillips deceased, twenty years or more before giving his deposition, and of meeting again one or more of the family, he believes doctor Joseph Phillips was one, in the city of Philadelphia, at the office of Hilary Baker, mayor of the city, to authenticate the

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handwriting to the said instrument of conveyance, as party or witness, or both. Although he does not recollect the transaction with that precision which might be expected from an interested party, he remembers as much as could be expected after so long an interval from an unconcerned person, and enough we think, to satisfy a court, in connection with other circumstances, that the deed to which he subscribed his name as a witness was executed, and is the deed, a copy of which was offered by the plaintiff. He remembers attesting an instrument of writing at the house of Jonathan Phillips, which he believed to be a conveyance of land; he remembers meeting some of the family, one of whom was Joseph Phillips, at the office of Hilary Baker, mayor of Philadelphia, for the purpose of authenticating the same instrument. This instrument was authenticated by him before the mayor, as appears by his certificate. The deposition of the widow of Benjamin Powell, too, is entitled to consideration.

We think that in a contest between Joseph Phillips and Stephen Sicard, this testimony and these circumstances would have been held sufficient to prove the execution of his deed, and would have proved that his title was conveyed by it.

If the title of Phillips was conveyed to Sicard, then Sicard could assert that title in a court of justice as effectually as Phillips might assert it; unless the defendants were protected from his claim by some provision of the statute. The 1st section, after declaring that

no estate of inheritance, &c. "in lands or tenements shall  
[ \* 139 ] be conveyed from one to another, "unless the conveyance  
be declared by writing, sealed and delivered," adds, "nor  
shall such conveyance be good against a purchaser for valuable con-  
sideration, not having notice thereof, or any creditor, unless the same  
writing be acknowledged," &c.

These words, we think, can apply only to purchasers of the title asserted by virtue of the conveyance, and to creditors of the party who has made it. They protect such purchasers from a conveyance of which they had no notice, and which, if known, would have prevented their making the purchase; because it would have informed them that the title was bad, that the vendor had nothing to sell. But the purchaser from a different person of a different title, claimed under a different patent, would be entirely unconcerned in the conveyance. To him it would be entirely unimportant whether this distinct conflicting title was asserted by the original patentee or by his vendee. The same general terms are applied to creditors and to purchasers; and surely the word creditors can mean only creditors of the vendor.

This construction of this part of the statute has, we believe, been uniformly made.

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A conveyance, then, in writing, sealed and delivered by the vendor in each case, was sufficient to pass the title from Phillips to Stephens and from Stephens to Marshall. The conveyance from Marshall to Sicard is unexceptionable.

If the original deeds had been produced, their execution was, we think, so proved that they ought to have been submitted to the jury. If this be correct, it cannot be doubted that the copies were admissible. The loss of the originals is proved incontestably, and the truth of the copies is beyond question.

We think, therefore, that the court erred "in rejecting the copies of the deeds from Phillips to Stephens, and from Stephens to Marshall, and from Marshall to Sicard." Consequently, the first instruction to the jury, "that the plaintiff has given no evidence to support the first count on the demise of Sicard," ought not to have been given.

The second instruction, that a possession taken under a junior patent, which interferes with a senior patent, the lands covered by which are totally unoccupied by any person holding or claiming under it, is not limited by the actual inclosure, \*but is so coextensive with the boundaries claimed under [ \*140 ] such junior patent, is entirely correct, and conforms to the decisions of this court.

The third instruction is also correct. The second count in the declaration, being on a demise from a different party asserting a different title, is not distinguishable, so far as respects the bar of the act of limitations, from a new action. See Miller's Heirs v. M'Intyre, at this term. 6 Pet. 61. The construction of the act of limitations, that if adverse possession be taken in the lifetime of the ancestor, and be continued for twenty years, and for ten years after the death of the ancestor, no entry being made by the ancestor or those claiming under him, the title is barred, is established by the decisions of this court as well as of the courts of Kentucky. 4 Wheat. 213. This point may perhaps determine the cause ultimately in favor of the defendants. But as this court cannot know judicially that the verdict of the jury was founded on the bar created by the adverse possession of the defendants, and not on the want of title in the plaintiffs, whose title-deeds were excluded by the circuit court, the judgment must be reversed, and the cause remanded, with directions to award a *venire facias de novo*.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Kentucky, and was argued by counsel; on consideration whereof, this court is of opinion that there is error in the proceedings and judg-

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United States v. Paul. 6 P.

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ment of the said court in this: that the said court rejected the copies of the deeds offered by the plaintiffs as evidence, being of opinion that there was no proof of the execution of two of them. Therefore, it is considered by the court that the judgment of the said circuit court be reversed and annulled, and that the cause be remanded to the said circuit court, with directions to award a *venire facias de novo*.

14 H. 253.

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**THE UNITED STATES v. JAMES PAUL.**

6 P. 141.

The third section of the act of congress entitled "an act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," passed March 3, 1825, (4 Stats. at Large, 115,) adopted only the laws of the several States in force at the time of its enactment.

CERTIFICATE of division of opinion of the judges of the circuit court of the United States for the southern district of New York.

The defendant, James Paul, was indicted at October term, 1830, of the circuit court, for burglariously breaking and entering a store at West Point, with intent to steal.

[ \* 142 ] \*The store was not in any way identified with a dwelling, and the offence, therefore, was not a burglary at common law, nor by the laws of New York, as existing in 1825, but was created a burglary in the third degree by the Revised Statutes of New York, going into operation in 1829. The judges were divided in opinion upon the question whether the 3d section of the act of 1825 adopted only the then existing laws of the State, and so certified.

The case was submitted to the court without argument, by Taney, attorney-general of the United States, and by Washington Quincy Morton, for the defendant.

MARSHALL, C. J., stated it to be the opinion of the court that the third section of the act of congress, entitled "an act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," passed March 3, 1825, is to be limited to the laws of the several States in force at the time of its enactment. This was ordered to be certified to the circuit court for the southern district of New York.

5 H. 441

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*Oliver v. Alexander. 6 P.*

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**ROBERT OLIVER, THE BANK OF THE UNITED STATES, AND THE UNION BANK OF MARYLAND, ASSIGNEES OF SMITH AND BUCHANAN, HOLLINS AND M'BLAIR, AND JOHN S. STYLES, EXECUTOR OF GEORGE STYLES, Appellants, v. JAMES ALEXANDER and SEVENTY-SEVEN OTHERS, Seamen of the Ship Warren, Appellees.**

6 P. 143.

Though seamen join in a libel in the admiralty, the matter in dispute is several with each libellant, and the claimant can appeal only in regard to a separate demand by a seaman exceeding the sum of \$2,000.

THE case is stated in the opinion of the court.

*Hoffman*, for the motion to dismiss the appeal.

*Wirt and Taney*, (attorney-general,) *contra*.

\* **STORY, J.**, delivered the opinion of the court.

This is an appeal from certain decrees of the circuit [ \* 144 ] court of the district of Maryland, rendered in pursuance of the mandate of this court when the same cause was formerly before us ; the report of which will be found in *Sheppard v. Taylor*, 5 Pet. 675, *et seq.*

\* After the cause was remanded, the circuit court referred [ \* 145 ] it to a commissioner to ascertain and report to the court the sums respectively due to each of the officers and seamen who were libellants for their wages, and interest thereon. In conformity with this order of reference, the commissioner made reports of the amount so due to each of the libellants then before the court ; and thereupon the court, after confirming the second and final report of the commissioner, proceeded to enter a separate decree for each libellant, for the amount so found due to him, and to apportion, *pro rata*, the payment of the same out of the funds in the hands of Robert Oliver and others, the assignees in whose hands the funds were attached ; and to decree the deficit to be paid by the owners of the ship Warren. The sums so decreed to the libellants, respectively, in no case exceeded \$900, and most of them fell short of \$500. From the separate decrees so rendered, the assignees prayed an appeal to this court, and gave a several appeal bond upon the appeal from each decree, as well as a joint appeal bond for the whole. Under these circumstances, a motion has been made to dismiss the appeal, upon the ground that the sum in controversy in each decree is less than \$2,000 ; and, as such, is insufficient to give this court appellate jurisdiction. The motion is resisted upon the other side

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Oliver v. Alexander. 6 P.

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upon the ground that the aggregate in controversy, under the whole of the decrees taken together, greatly exceeds that value.

The question is one of great practical importance; but, in our judgment, not of any intrinsic difficulty. The present is a case of seamen's wages, in which there is necessarily a several and distinct contract with each seaman, for the voyage, at his own rate of wages; and though all may sign the same shipping paper, no one is understood to contract jointly with, or to incur responsibility for any of the others. The shipping articles constitute a several contract with each seaman to all intents and purposes; and are so contemplated by the act of congress for the government and regulation of seamen in the merchants' service; act of 1790, c. 29;<sup>1</sup> and have been so practically interpreted by courts of justice, as well as by merchants and mariners, in all commercial nations in modern times. It is

well known that every seaman has a right to sue severally [ \* 146 ] \*for his own wages, in the courts of common law; and that

a joint action cannot be maintained in such courts by any number of the seamen, for wages accruing under the same shipping articles for the same voyage. The reason is, that the common law will not tolerate a joint action, except by persons who have a joint interest, and upon a joint contract. If the cause of action is several, the suit must be several also. But a different course of practice has prevailed for ages in the court of admiralty, in regard to suits for seamen's wages. It is a special favor, and a peculiar privilege allowed to them, and to them only; and is confined strictly to demands for wages. The reason upon which this privilege is founded is equally wise and humane; it is to save the parties from oppressive costs and expenses, and to enable speedy justice to be administered to all who stand in a similar predicament; in the expressive language of the maritime law, *velis levatis*. And the benefit is equally as great to the ship-owner as to the seamen; though the burden would otherwise fall upon the latter, from their general improvidence and poverty, with a far heavier weight. A joint libel may therefore always be filed in the admiralty by all the seamen who claim wages for services rendered in the same voyage, under the same shipping articles. But although the libel is thus, in form, joint, the contract is always treated in the admiralty according to the truth of the case, as a several and distinct contract with each seaman. Each is to stand or fall by the merits of his own claim, and is unaffected by those of his co-libellants. The defence which is good against one seaman may be wholly inapplicable to another

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<sup>1</sup> 1 Stats. at Large, 131.

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One may have been paid ; another may not have performed the service ; and another may have forfeited, in whole or in part, his claim to wages. But no decree whatsoever, which is made in regard to such claim, can possibly avail to the prejudice of the merits of others, which do not fall within the same predicament. And wherever, from the nature of the defence, it is inapplicable to the whole crew, the answer invariably contains separate averments, and is applied to each claim according to its own peculiar circumstances. The decree follows the same rule, and assigns to each seaman severally the amount to which he is entitled, and dismisses the libel as to those, and those only, who have maintained no right to the interposition of the \*court in their favor. The [ \*147 ] whole proceeding, therefore, from the beginning to the end of the suit, though it assumes the form of a joint suit, is, in reality, a mere joinder of distinct causes of action by distinct parties, growing out of the same contract, and bears some analogy to the known practice at the common law, of consolidating actions against different underwriters, founded upon the same policy of insurance. Be this as it may, it is the established practice of the admiralty. The act of congress already referred to adopts and sanctions the practice; and it enacts that in proceedings *in rem* against the ship for mariners' wages, "all the seamen or mariners, having cause of complaint of the like kind against the same ship or vessel, shall be joined as complainants." Act of 1790, c. 29, § 6. It thus converts what, by the admiralty law, is a privilege, into a positive obligation, where the seamen commence a suit at the same time in the same court, by a proceeding *in rem* for their wages. And it further directs that "the suit shall be proceeded on in the said court, and final judgment be given, according to the course of admiralty courts in such cases used." Act of 1790, c. 29, § 6.

From this summary view of the nature and operation of the proceedings in the admiralty in cases of joint libels for wages, it is obvious that the claim of each seaman is distinct and several; and the decree upon each claim is in like manner distinct and several. One seaman cannot appeal from the decree made in regard to the claim of another; for he has no interest in it, and cannot be aggrieved by it. The controversy, so far as he is concerned, is confined solely to his own claim; and the matter of dispute between him and the owners or other respondents, is the sum or value of his own claim, without any reference to the claims of others. It is very clear, therefore, that no seaman can appeal from the district court to the circuit court, unless his own claim exceeds \$50; nor from the circuit court to the supreme court, unless his claim exceeds \$2,000. And the

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same rule applies to the owners or other respondents, who are not at liberty to consolidate the distinct demands of each seaman into an aggregate, thus making the claims of the whole the matter in dispute; but they can appeal only in regard to the demand of a seaman which exceeds the sum required by law for that purpose, as [ \* 148 ] a distinct "matter in dispute. If the law were otherwise. it would operate in a most unjust and oppressive manner; for then the seamen would be compellable to file a joint libel; and, if any controversy existed as to the claim of a single seaman, all the others would be compellable to be dragged before the appellate tribunals, and incur enormous expenses; even when their own rights and claims were beyond all controversy, and in truth were not controverted. The form of proceeding would thus be made an instrument to subvert the very object for which it was instituted.

But it has been argued that this court formerly entertained jurisdiction of this very cause upon an appeal by the seamen, and passed a decree in their favor; and that the present appeal is to the erroneous proceedings of the circuit court in carrying into effect that decree; and if the seamen may appeal, the original respondents may appeal also. It is true that the appeal was taken by the seamen, and jurisdiction entertained by this court in the manner stated at the bar; but a moment's attention to the state of facts and posture of the case at that time, will show that the conclusion now attempted to be drawn from them, is wholly unsupported. There was nothing, then, upon the record to show what were the amounts respectively claimed by, and due to the seamen. The decrees, both in the district court and in the circuit court, were, by the consent of the parties, *pro forma*, dismissing the libel as to all the libellants, without any inquiry into or ascertainment of the claim of any one of them; and this dismissal was for the avowed purpose of taking an appeal to this court, in order to settle the only real controversy between the parties to the appeal; namely, whether the funds in the hands of the assignees were liable to the claims of the seamen in point of law. Such a proceeding, assented to by all the parties in interest, necessarily admitted that the sums in controversy between the parties were sufficient to found the appellate jurisdiction of this court. The argument at the bar proceeded upon this implied admission; and there was nothing in the record before the court that contradicted the admission. It was not possible for the courts, therefore, to know what was due or claimed by each seaman; and, though consent cannot give jurisdiction to this court by way of appeal, where the matter in dispute is less than \$2,000, \* yet an admission of a sufficient value, by the parties, is presumed to be correct, where the

[ \* 149 ]

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record does not establish the contrary. *Sheppard v. Taylor*, 5 Pet. 675.

In looking into the original proceedings, which are not, indeed, now before us, except for incidental purposes, but only such as have been consequent upon the mandate, it appears that the original libel was by Sheppard alone; that, by subsequent amendments, other libellants were added; that, in the year 1819, another amended libel was filed, embracing all the libellants, and asserting claims on their part to wages in the aggregate to the amount of \$31,000; and that subsequently, in December, 1825, another amended libel or petition was filed in behalf of the libellants, making the assignees parties, and making a positive claim for interest, also, upon the amount of their wages. It was upon the libels thus amended and filed, that the decree of this court, as well as those of the court below, were founded. And the last asserts, on the part of one of the libellants, (Stephen Cassin,) a claim for \$3,476.51, leaving the claims of the others in the most general form, with no averments ascertaining the amounts which were then respectively demanded by them. Indeed, the very loose and inartificial structure of all the libels could not escape observation, and might, in earlier stages of the cause, have been open to objection for the want of due certainty and precision, if any exceptions had been especially promoted on behalf of the respondents; but as none were made, there was an implied waiver of all imperfections of this sort. This court, in its decree, affirmed the right of the seamen to their wages, and directed a separate and several decree to be entered for the amount due to each libellant respectively, as soon as the same should be ascertained by a commissioner. So that the decree itself severed the claims of the libellants in all future proceedings in the cause; as in truth these claims ought to have been severally propounded in the original libel. It is manifest, then, that each libellant has no joint interest in the claim of any other; and that each is in its nature and character distinct and independent; and the amount in controversy being now ascertained by a several decree, that constitutes, in regard to the respondents, the sole matter in dispute \*between them, and the respective libellants. [ \*150 ] Neither party can, then, claim an appeal to this court, in regard to the claim of any libellant, unless that claim exceeds \$2,000. The case is not distinguishable, in principle, from that of an information of seizure, or a libel on a capture as prize, where various claims are interposed for different portions of the property, by persons claiming the same by distinct and independent titles. In such a case, though the original libel is against the whole property jointly, yet it is severed by the several claims; and no appeal lies by either party,

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unless in regard to a claim exceeding the sum of \$2,000 in value. This has been the long and settled practice in the admiralty courts of our country.

Upon the whole, it is the opinion of this court that, for the want of jurisdiction, the present appeal must be dismissed; no one of the decrees in the circuit court involving a matter in dispute sufficient in value to justify the exercise of the appellate authority of this court.

11 H. 522; 12 H. 347; 17 H. 3; 6 Wal. 208; 16 W. 345; 10 O. 148.

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**SETH SPRING and others, Plaintiffs in Error, v. THE EXECUTORS OF WILLIAM GRAY, Defendants in Error.**

6 P. 151.

To come within the exception in the statute of limitations concerning merchant's accounts, an action on the case must be founded on an account between merchants, which concerns the trade of merchandise.

A contract of charter-party on half profits, though both parties are merchants, is not within this exception.

THE case is stated in the opinion of the court.

*Evans*, for the plaintiffs.

*Webster*, contra.

[ \*160 ] \* MARSHALL, C. J., delivered the opinion of the court.

This cause depends entirely on the question whether the plaintiffs are within the exception of the statute of limitations, made in favor of "such accounts as concern the trade of merchandise between merchant and merchant."

The plaintiffs in error brought an action on the case against the defendants, in the proper court of the State of Maine, [ \*161 ] \* which was removed by the defendants into the circuit court of the United States for the district of Maine.

The first count was for balance of accounts annexed to the writ; the second was for money had and received. The defendants pleaded non-assumpsit and the statute of limitations. Issue was joined on the first plea. To the second, the plaintiffs replied that the accounts and promises mentioned in the declaration are and arose from such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants; and issue was joined on this replication.

At the trial, the plaintiffs produced the bill of lading of the outward cargo of the bark Morning Star, signed by Andrew M. Spring, the

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master of said bark, with the contract on the back of it, signed by William Gray, the testator of the defendants, and by Seth Spring and Sons, the plaintiffs and owners of the bark Morning Star; which bill of lading and contract are in these words:—

"Shipped in good order, and well conditioned, by William Gray of Boston, a native citizen of the United States of America, for his sole account and risk, in and upon the bark called the Morning Star, whereof is master for this present voyage, Andrew M. Spring, now in the harbor of Boston, and bound for Algiers; to say: [The merchandise is here described by marks, numbers, and quantities;] being marked and numbered as in the margin, and are to be delivered in like good order and well conditioned, at the aforesaid port of Algiers, (the dangers of the seas only excepted,) unto Andrew M. Spring, or to his assigns, he or they paying freight for the said goods, as per agreement indorsed hereon, without primage or average. In witness whereof, the said master of the said bark hath affirmed to four bills of lading of this tenor and date, one of which being accomplished, the other three then to stand void. Dated in Boston, May 26, 1810.

ANDREW M. SPRING."

The proceeds of the within cargo, amounting to \$35,202.83, as per invoice, costs and charges, is to be invested in Algiers or some other port (after deducting all charges, consignee's commission included, except freight and premium of insurance within, of which two last-mentioned charges are to be made \*on the [\*162] goods,) and returned in the said bark Morning Star to Boston, when Seth Spring and Sons (owners of said bark) are to recover one half of the net profits thereon, in lieu of freight and primage, the voyage round. The consignee's commissions to be two and a half per cent. on the sales of the within cargo; and no commissions to be charged in Boston except what is paid an auctioneer.

SETH SPRING AND SONS,  
WILLIAM GRAY.

The plaintiffs also produced several letters and papers from William Gray, the master of the Morning Star, and others, respecting the outward voyage of the bark, together with the bills of lading and invoices of her inward cargo, which was delivered to the defendants. They also produced an account from the books of Seth Spring and Sons, as follows:—

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*William Gray, Esq., of Boston, Mass., in Account with Seth Spring  
Dr. and Sons. Cr.*

1810, Sept. For loss sustained on the sloop Fanny, Captain Ebenezer Jordan, master, which said Gray insured	2,500.00	1811. By amount of the outward cargo of the bark Morning Star, as per original invoice and bill of lading	35,202.83
1811, Oct. For 35,000 gallons oil in casks delivered him from bark Morning Star, William Nason, master, at Boston, at 7s. 6d. per gal.	43,750.00	His half the profits of said Morning Star's voyage	14,469.03
127 cases oil delivered by same, at \$10 per case	1,270.00	1829. Balance now due from estate of said William Gray	34,477.45
53,803 lbs. cotton left with Mr. Lear, and afterwards paid for by the Dey of Algiers to Com. Stephen Decatur, at 30 cents per lb.	16,140.90		
Cash paid by A. M. Spring to Bainbridge and Co. merchants, England, and by them passed to the credit of said Gray Paid A. M. Spring his commissions at 2½ per cent. on said bark's outward cargo, as per agreement	2,000.00		
1829. Interest on loss on sloop Fanny, 19 years	880.00		
Interest on one half the profits of Morning Star's voyage, per agreement	2,850.00		
	14,758.41		

When the plaintiffs had closed their evidence, the court asked whether they had any other cause of action than such as arose from the bill of lading of the outward cargo of the bark [ \* 163 ] \* Morning Star, and the contract indorsed thereon; and they answered that they had not.

The counsel for the defendants then moved the court to instruct the jury, that inasmuch as the plaintiffs had admitted that their whole cause of action arose from said bill of lading and contract indorsed thereon, the said bill of lading and contract, with the other papers, documents, and testimony aforesaid, were not sufficient evidence, in point of law, to maintain the issue joined on the part of the plaintiffs, in respect to their replication of merchants' accounts.

The plaintiffs' counsel objected to such instructions, and prayed the court to instruct the jury that the evidence introduced was sufficient to prove, and did prove, the issue joined on the part of the plaintiffs.

The court instructed the jury that inasmuch as the plaintiffs had admitted that their whole cause of action arose from said last mentioned bill of lading and contract indorsed thereon, the said bill of lading and contract, with the other papers, documents, and testimony aforesaid, were not sufficient evidence, in point of law, to maintain the issue last aforesaid, on the part of the plaintiffs. To this instruction an exception was taken.

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A verdict was found for the defendants; and this writ of error brings up the judgment which was rendered thereon.

The statute of Maine is copied from the 20th of James I., and its words are, "all actions of account and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, &c. shall be commenced," &c.

It would seem to be the necessary construction of these words, that the actions on the case to which the exception applies, must be founded on an account. The language of the act conveys the same meaning as if it had been "all actions of account, and all actions on the case, other than such as are founded on such account as concerns the trade of merchandise," &c. The foundation of the action must be an account, not a contract.

From the association of actions on the case, a remedy given by the law for almost every claim for money, and for the redress of every breach of contract not under seal, with actions \* of [ \*164 ] account, which lie only in a few special cases; it may reasonably be conceived that the legislature had in contemplation to except those actions only for which account would lie. Be this as it may, the words certainly require that the action should be founded on an account. The account must be one "which concerns the trade of merchandise." The case protected by the exception is not every transaction between merchant and merchant, not every account which might exist between them, but it must concern the trade of merchandise. It is not an exemption from the act, attached to the merchant merely as a personal privilege, but an exemption which is conferred on the business as well as on the persons between whom that business is carried on. The account must concern the trade of merchandise; and this trade must be, not an ordinary traffic between a merchant and any ordinary customers, but between merchant and merchant. This "trade of merchandise," which can furnish an account protected by the exception, must be not only between merchant and merchant, but between the plaintiff and defendant. The account—the business of merchandise which produces it—must be between them.

If these propositions be well founded, and we believe they are, let us apply them to the case.

The defendants were undoubtedly merchants. The plaintiffs, Seth Spring and Sons, were also merchants. But they were likewise ship-owners. They were the proprietors of vessels which they hired to others for freight. A charter-party, a contract by which the owner lets his vessel to another for freight, does not change its character, because the parties happen to be merchants. It is still a special

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contract, whereby a compensation is stipulated for a service to be performed; and not an account concerning the trade of merchandise. It is no more "an account," and no more connected with "the trade of merchandise," than a bill of exchange or a contract for the rent of a house, or the hire of a carriage, or any other single transaction which might take place between individuals who happened to be merchants. An entry of it on the books of either could not change its nature, and convert it from an insulated transaction between individuals, into an account concerning the trade of merchandise, between merchant and merchant. This must depend on the [ \* 165 ] nature and character of the \*transaction, not on the book in which either party may choose to enter a memorandum or statement of it.

Had the freight contracted for been a sum in gross, or a sum dependent on the space occupied by the cargo, or on its weight, or on any estimate of its value, it would have been perceived at once to be a claim founded on contract, and not on account.

Is the nature of the transaction varied by the fact, that the freight to be paid by the charterer, instead of being a specific sum, or a sum to be ascertained by some given rule, is dependent on the profits of the adventure? That the sales of the outward and inward cargo, and all the expenses attendant on the enterprise, must be examined, in order to ascertain the amount of freight? This process must undoubtedly be gone through in an action on the contract, but does its necessity convert the action, which ought to be on the contract, into one founded on an account concerning the trade of merchandise between merchant and merchant? The account of the sales of the outward cargo is to be adjusted between the shipper and his consignee, not between the shipper and the ship-owner in his adventitious character of a merchant. So the sales of the return cargo must be examined in order to ascertain whether any and how much profit has been made, and whether the ship-owner is entitled to any and how much freight. But this account is not founded on trade and merchandise between the owner and affreighter of the vessel. It is founded on the trade of the affreighter alone, to which reference must be made in order to ascertain the amount of freight. Mr. Gray could not be considered as the factor of Seth Spring and Sons, selling their goods. He was selling his own; and the relation between them was not that of merchant and factor, but of charterer and charteree of a vessel by special contract.

If we were to decide this case on the words of the statute, we should not think that the plaintiffs had brought themselves within the exception. We should not consider the action as founded on

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"such an account as concerns the trade of merchandise between merchant and merchant."

This opinion is not changed by cases which are to be found in the books.

In *Webber v. Tivil*, 2 Saund. 121, the plaintiff's declaration contained two counts, one in *indebitatus assumpsit* for money [ \* 166 ] had and received by the defendant for the plaintiff's use, and for goods, wares, and merchandise sold and delivered, and the other on an *instimul computassent*. To the plea of the act of limitations the plaintiff replied, that the money in the several provisions mentioned became due and payable on trade between the plaintiff and defendant as merchants, and wholly concerned merchandise. The defendant demurred, and the whole court gave judgment in his favor.

Morton, J., was of opinion, that only actions of account were within the exception. The report does not contain the reasons assigned by the other judges, otherwise than by stating that they were the reasons given by Mr. Jones in his argument. These were, that the statute intends to except nothing concerning merchandise between merchants, but only accounts current between them, whereas the declaration in the second count was on an account stated and agreed. He also contended, that the first count did not make a case to be brought within the exception, it being only a bargain for wares sold and for money lent; and although it concerned merchandise, and was between merchants, yet that was no reason why it should be excepted out of the statute; for if it should be excepted, by the same reason every contract made between merchants would also be excepted, which was not the intention of the statute; for in the statute, accounts between merchants only are excepted, and not contracts likewise. He also contended, that actions of account only were within the exception. This point has been since overruled, though it seems to have been long considered as settled law.

This case having been decided, as the reporter informs us, for the reasons assigned by Jones, his argument must be taken as the opinion of the court. It decides, that only accounts, not contracts, between merchants, even although they may concern the trade of merchandise, are within the exception, and that the accounts must be current.

In *Cotes v. Harris*, at Guildhall, Dennison, J., held that the clause in the statute of limitations, about merchants' accounts, extended only to cases where there were mutual accounts and reciprocal demands between two persons. This was only the decision of a single judge; but Mr. Justice Buller seems to have given it his sanction also, by introducing it into his work. \*Bul. [ \* 167 ]

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Ni. Pri. 150. And Lord Kenyon quoted it with approbation, in *Cranch v. Kirkman*, Peake's Ni. Pri. 121, adding that he had furnished his note of the case to Mr. Justice Buller.

The distinction between an account current and an account stated, has been often taken, 1 Ves. 456; 4 Mod. 105; 2 Ves. 400; 1 Mod. 270; and is now admitted.

The English cases certainly do not oppose the opinion we have formed on the words of the statute.

The American cases, as far as they go, are in favor of it.

In *Mandeville v. Wilson*, 5 Cranch, 15, this court said, that the exception extended to all accounts current, which concerned the trade of merchandise between merchant and merchant. The only addition made in this part of the opinion to the words used in the statute, is the introduction of the word "current." The statute saves "accounts current." The opinion proceeds to say that an account closed by the cessation of dealing between the parties, is not an account stated, and that it is not necessary that any of the items should be within five years. This decision maintains the distinction between accounts current and accounts stated.

In *Ramchandu v. Hammond*, 2 Johns. 200, the court determined that the statute of New York, though slightly varying in its language from the English statute, was to be construed in the same manner, and "must be confined to actions on open or current accounts." "It must be a direct concern of trade; liquidated demands, or bills and notes which are only traced up to the trade or merchandise, are too remote to come within this description."

In the case of *Coster et al. v. Murray et al.*, 5 Johns. Ch. 522, a purchase of goods was made by the agents of the parties, at Copenhagen, and shipped to the defendants, merchants in New York, on joint account, under an agreement made by the agents, that the goods should be sold by the defendants, free from commission, and one third of the proceeds paid to the plaintiffs, who were insurers. The goods were received and sold by the defendants, who mingled the money with their own, and refused to pay any part of it to the plaintiffs, unless on terms to which the plaintiffs would not accede. To a bill filed by the plaintiffs, the defendants pleaded the act of limitations. The plaintiffs contended that the claim was within [ \* 168 ] \* the exception of the statute in favor of accounts between merchants, and also that it related to the execution of a trust, and was therefore not within the statute.

On the first point, Chancellor Kent said, "to bring a case within the exception of the statute, there must be mutual accounts, and reciprocal demands between two persons."

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"In the present case there was no account current between the parties. There are no mutual and reciprocal demands."

"The defendants took charge of and agreed to be accountable for some goods, or the proceeds thereof, in which the parties had a joint interest; and as concerns the parties, and as between them, this hardly seems to be a trade of merchandise between merchant and merchant."

The chancellor took a very elaborate review of all the English cases in which this exception had been discussed. Many of them went off on other points, many were indecisive, and some of them seem to be opposed to each other, though not on the precise question which has been argued in this case.

He concluded this review by observing: "assuming the case before me to be one that concerned the trade of merchandise between merchant and merchant, I should rather be inclined to think the statute was well pleaded, and that the case did not fall within the exception."

A decree was made in favor of the plaintiff, on the other point, from which the defendant appealed to the court of errors.

The cause was argued on several points, the first of which was, "whether it came within the exception of the statute concerning the trade of merchandise between merchant and merchant, their factors or servants."

Mr. Chief Justice Spencer said the chancellor had examined the case very elaborately, and had come to the conclusion that the statute was well pleaded; and that the case does not fall within the exception. He added, "whether the statute is at all applicable to a case of mutual dealing and mutual credits between merchant and merchant, is a question not now necessary to be decided, because the present is not a case of that kind. On the part of the respondents, this is no account at all. This is a case of an account merely on the part of the appellants; there is no selling or trading. It is a case of a joint purchase of \* goods, where one of the pur- [ \*169 ] chasers takes the whole goods, and is to account for one third of the proceeds. In such a case, where the items of an account are all on one side, in my judgment it is not within the reason or principle of the exception; which must have intended open and current accounts, where there was mutual dealing and mutual credits."

Judges Platt and Woodworth concurred. There was some division in the court of errors, but the decree of the chancellor was affirmed.

This case is stronger than that under consideration, and turns on principles which decide it.

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*Dufau v. Couprey's Heirs.* 6 P.

No doubt is expressed in it on the necessity of accounts being mutual, and being open and current, to bring them within the exception of the statute.

On a commercial question, especially on a question deeply interesting to merchants, and to merchants only, the settled law of New York is entitled to great respect elsewhere.

We have found no conflicting decision in any of the States.

The account, from the books of the plaintiffs, contains one item not founded on the contract for the freight of the bark Morning Star, the loss on the sloop Francis, insured by said Gray. But this item itself is not within the exception, and was abandoned by the plaintiffs, who declared that their whole cause of action arose from the contract. The claim, to bring the case within the exception, rests entirely on the sale of the inward cargo. This single transaction has not equal (certainly not superior) pretensions to being an account current between merchant and merchant, a case of mutual accounts between them, with the sale made by the Murrays, in *Coster et al. v. Murray et al.*, of goods purchased on joint account, shipped to the defendants on joint account, and sold by the defendants on joint account.

We are of opinion that this action is not founded on an account concerning the trade of merchandise between merchant and merchant, their factors or servants, and is not within the exception of the statute of limitations. There is no error in the instructions given by the circuit court, and the judgment is affirmed, with costs.

12 P. 300.

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CHARLES B. DUFAU, Plaintiff in Error, *v.* JEAN HENRY COUPREY'S HEIRS, Defendants in Error.<sup>1</sup>

6 P. 170.

If the record shows two pleas, and an issue and verdict for defendant on one, and no issue on the other, a judgment for the defendant is not erroneous.

ERROR to the district court of the eastern district of Louisiana.

*Livingston*, for the plaintiff in error.

MARSHALL, C. J., delivered the opinion of the court.

There were two pleas by the defendant: 1. That the defendant was not indebted to the plaintiff. 2. That the subject-matter of the suit was *res adjudicata*. The former plea was triable by the jury;

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<sup>1</sup> This case was decided at January term, 1831.

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Cox v. United States. 6 P.

the latter by the court. There was a trial by the jury of the issue, and the jury found a verdict for the defendant. Upon the plea of *res adjudicata*, there does not appear to have been any replication or denial, so as to make any issue to the court. There is nothing on the record to "show that the question of *res* [ \*171 ] *adjudicata* was even submitted to the jury upon the trial. Their verdict, for aught that appeared on the record, was simply confined to the first and proper issue triable by the jury. This issue being found for the defendant, the other plea became immaterial to the defendant. The court, then, cannot infer that it was ever tried. There is, then, no error apparent on the record, and the judgment is affirmed, with costs.

7 H. 706.

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NATHANIEL COX, NATHANIEL AND JAMES DICK, Plaintiffs in Error,  
v. THE UNITED STATES, Defendants in Error.

6 P. 172.

A joint and several judgment having been rendered in Louisiana, the defendants severally sued out writs of error; a motion to dismiss the writs upon the ground that all the defendants ought to have joined in one writ, was overruled.

The demand in a petition being only \$15,000, a judgment for \$20,000, is erroneous.

A treasury transcript is admissible in evidence for a surety to prove the date of a payment credited in the account.

Though an official bond of a navy agent was, in fact, executed at New Orleans, it was a contract to be executed at Washington, and the liability of its parties must be governed by the rules of the common law.

Two writs of error to the district court of the United States for the eastern district of Louisiana. The facts material to the merits are stated in the opinion of the court. But a motion was made to dismiss the writs, upon the ground that all the plaintiffs in error should have joined in one writ. To present the facts upon which this motion was grounded, it is necessary to give the copy of the judgment, which was as follows:—

[ \*178 ]    "The United States v. Representatives of Hawkins *et al.*

The court having maturely considered the motion in arrest of judgment, now order that judgment be entered up, as of the 15th instant, against the estate of John Dick and Nathaniel Cox, jointly and severally, for the sum of \$20,000, with six per cent. interest from the 2d day of January, 1830, until paid, and costs of suit; and that judgment be entered up against Nathaniel Dick and James Dick, for the sum of \$10,000, each, with six per cent. interest from 2d January, 1830, until paid, and the costs."

The judgment debtors severally sued out writs of error and sepa-

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rate citations were issued and served. The attorney-general moved to dismiss the writs of error, because the plaintiffs should have joined therein.

[ \*182 ] \* The court overruled the motion to dismiss the writ of error. The case afterwards came on for argument.

*Taney, (attorney-general,) for the United States.*

*Johnston, contra.*

[ \*198 ] THOMPSON, J., delivered the opinion of the court.

This cause comes up by writ of error from the district court of Louisiana district. The suit was instituted according to the practice of that court by petition, which states that Joseph H. Hawkins, late of New Orleans, navy agent of the United States, now deceased, John Dick, late of the same place, deceased, and Nathaniel Cox, of the same place, on the 10th day of March, 1821, by their bond, became jointly and severally bound to the United States, in the penalty of \$20,000. To which obligation a condition was annexed, by which it was provided that, if the said Joseph H. Hawkins shall regularly account, when thereunto required, for all public moneys received by him from time to time, and for all public property committed to his care, with such person or persons, officer or officers of the government of the United States, as shall be duly authorized to settle and adjust his accounts, and shall pay over as he may be directed, any sum or sums that may be found due to the

United States, upon any such settlement, and shall faithfully [ \*199 ] discharge, in every respect, \*the trust reposed in him, then

the obligation to be void, otherwise to remain in full force and virtue; and the petition further states that the said Hawkins did not account for all public moneys received by him, and did not pay over the sums due from him to the United States, but at his death remained indebted to the United States in the sum of \$15,553.18, for moneys received by him from the United States since the date of the said bond, as navy agent, by reason whereof the condition of the said bond had become broken, and the said debt become due; and prayed process of summons against the legal representatives of Hawkins and Dick, deceased, and against Nathaniel Cox, and that judgment may be rendered against them for the said debt with interest and cost. A copy of the bond, duly authenticated, is annexed to the petition, and citations were issued against the legal representatives of J. H. Hawkins, deceased, and of John Dick, deceased, (without naming or designating them in any other manner,) and against Nathaniel Cox.

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As to the representatives of Hawkins, the citation was returned not found; and as to the representatives of John Dick, it was returned served, and the like return as to Cox.

Cox appeared and answered, denying that the sum of \$15,553.18, is due from the sureties, as stated in the petition, alleging that he has paid, since the decease of Hawkins, \$7,317.54, which had been allowed at the treasury of the United States; leaving a balance only of \$8,235.64. And, according to the course of practice in Louisiana he represents that the succession of his co-surety, John Dick, is solvent, and demands that the United States divide their action, by reducing their demand to the amount of the share and proportion due by each surety, which was overruled by the court.

Nathaniel Dick and James Dick appear and answer that they are two of three heirs of John Dick, and in no event bound for more than two thirds of any debt of John Dick, and deny that the debt is in any manner due by the estate of John Dick; but should the same be proved, they say they have received \* no more than [ \* 200 ] \$4,000 of the estate of John Dick, and are liable for no more than \$2,000 each, and pray judgment and trial by jury. The cause was tried by a jury, and a general verdict for \$20,000, found for the plaintiffs, being the amount of the penalty in the bond. Upon which the court gave judgment against the estate of John Dick and Nathaniel Cox, jointly and severally, for the sum of \$20,000, with six per cent interest from the 2d day of January, 1830, until paid; and also gave judgment against Nathaniel Dick and James Dick, for the sum of 10,000 each, with interest, &c.

In the course of the trial, a bill of exceptions was taken to the opinion of the court, in rejecting evidence offered on the part of Cox, in support of his answer, setting up the payment of \$7,317.54, made by him after the death of Hawkins.

It is deemed unnecessary to notice the numerous and palpable errors contained in this record; that which arises from the entry of the judgment is insuperable. It is difficult to conceive, unless through mistake, how such a judgment could be entered. The demand in the petition is only \$15,553.18. The verdict of the jury is \$20,000; and, upon this, a judgment is entered up, against the estate of John Dick and Nathaniel Cox, jointly and severally, for \$20,000, and a judgment also against Nathaniel Dick and James Dick for \$10,000, each. Upon no possible grounds, therefore, can this judgment be sustained.

There are, however, one or two questions arising upon this record which have been supposed at the bar to have a more general bearing, which it may be proper briefly to notice.

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Upon the trial, the defendant, N. Cox, offered in evidence a transcript from the books of the treasury, duly authenticated, purporting to be a list of payments made, and receipts taken and passed, at the treasury of the United States, in the name of Joseph H. Hawkins, since the 3d of September, 1823, it having been previously shown that Hawkins, died on the 1st day of October of that year.

This evidence was offered in support of the allegation in [ \*201 ] Cox's answer, that he had paid \* \$7,317.54, since the decease of Hawkins, in his capacity of surety. This testimony was objected to by the attorney of the United States, on the ground that no credits could be allowed, but such as had been presented at the treasury and refused. The objection was sustained by the court, and the evidence rejected.

This was supposed, in the court below, to come within the act of congress, 2d vol. Laws U. S. 595,<sup>1</sup> which declares that, in suits between the United States and individuals, no claim for a credit shall be admitted upon the trial, (except under certain specified circumstances, not applicable to this case,) but such as shall appear to have been presented to the accounting officers of the treasury for their examination, and by them disallowed.

This transcript is not set out in the record, and we can only judge of it from what is stated in the bill of exceptions; and from this it does not appear to be a case coming at all within the act of congress. It was not offered as evidence of any new claim for a credit which had not been presented to the accounting officers of the treasury. All the credits claimed had been given at the treasury; and the only purpose for which it was offered, was to show that such credits were given after the death of Hawkins; and although standing in his name, the payments could not have been made by him; and to let in evidence to show that they were in fact made by the surety. There is no evidence in the cause showing the course of keeping the accounts at the treasury in such cases. But it is believed that new accounts are never opened with the sureties. The accounting officers have no means of deciding whether the money is paid out of the funds of the sureties, or out of those of the principal. That is a question entirely between the sureties and the representatives of the principal. If application had been made at the treasury, and the accounting officers had transferred the payments, and given credit to Cox instead of Hawkins, it would not have changed the state of the case, as between the United States and the parties in the bond; and as between the sureties themselves, it would have decided nothing,

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<sup>1</sup> 1 Stats. at Large, 515.

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even if that was an inquiry that could have been gone into upon this trial. But nothing done at the treasury, which did not fall within the scope of the authority of the accounting officers in settling accounts, could have been received in evidence. \* In [ \* 202 ] the case of the *United States v. Buford*, 3 Pet. 29, it was held by this court that an account stated at the treasury department, which does not arise in the ordinary mode of doing business in that department, can derive no additional validity from being certified under the act of congress. Such statements at the treasury can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department, when the transactions are shown by its books. If, then, the accounting officers of the treasury could have done nothing more than had already been done, by giving credit on Hawkins's account for payments alleged to have been made by Cox after his death, whence the necessity of making any application to the treasury? It would have been a nugatory act; and the law surely ought not to be so construed as to require of a party a mere idle ceremony. The law was intended for real and substantial purposes; that the United States should not be surprised by claims for credits, which they might not be able to meet and explain in the hurry of a trial. But as no new credit was asked in this case, it would have been useless to make any application to the treasury for the mere purpose of being refused.

The evidence offered of Hawkins's account, as navy agent, with the Branch Bank at New Orleans, was properly rejected. It was not competent evidence in this cause, in any point of view, unless it was to show that there was a balance in favor of Hawkins, which ought to go to the credit of his account with the government. But for this purpose it was not admissible, it not having been presented to the accounting officers of the treasury, for allowance. This was setting up a claim for a new credit, and could not be received, according to the express provisions of the act of congress.

The proceedings in this cause, and the manner in which the judgment is entered, have been considered at the bar as affording a proper occasion for the court to decide whether this contract, and the liability of the parties thereupon, are to be governed by the rules of the civil law which prevail in Louisiana, or by the common law which prevails here.

It was contended on the part of the plaintiffs in error, that the United States were bound to divide their action, and take judgment against each surety only, for his proportion of the [ \* 203 ] sum due, according to the law of Louisiana; considering it a contract made there, and to be governed in this respect by the law of the State.

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On the part of the United States it is claimed that the liability of the sureties must be governed by the rules of the common law; and the bond being joint and several, each is bound for the whole; and that the contribution between the co-sureties is a matter with which the United States have no concern.

The general rule on this subject is well settled; that the law of the place where the contract is made, and not where the action is brought, is to govern in expounding and enforcing the contract, unless the parties have a view to its being executed elsewhere; in which case it is to be governed according to the law of the place where it is to be executed. 2 Burr. 1077; 4 Term Rep. 182; 7 Term Rep. 242; 2 Johns. 241; 4 Johns. 285.

There is nothing appearing on the face of this bond indicating the place of its execution, nor is there any evidence in the case showing that fact. In the absence of all proof on that point, it being an official bond, taken in pursuance of an act of congress, it might well be assumed as having been executed at the seat of government. But it is most likely that, in point of fact, for the convenience of parties, the bond was executed at New Orleans, particularly as the sufficiency of the sureties is approved by the district attorney of Louisiana.

But admitting the bond to have been signed at New Orleans, it is very clear that the obligations imposed upon the parties thereby looked for its execution to the city of Washington. It is immaterial where the services as navy agent were to be performed by Hawkins. His accountability for non-performance was to be at the seat of government. He was bound to account, and the sureties undertook that he should account for all public moneys received by him, with such officers of the government of the United States as are duly authorized to settle and adjust his accounts. The bond is given with reference to the laws of the United States on that subject. And such accounting is required to be with the treasury department, at the seat of government; and the navy agent is bound by the very terms of the

bond to pay over such sum as may be found due to the  
• 204 ] United States on such settlement; and such paying over  
must be to the treasury department, or in such manner as  
shall be directed by the secretary. The bond is, therefore, in every  
point of view in which it can be considered, a contract to be ex-  
ecuted at the city of Washington, and the liability of the parties must  
be governed by the rules of the common law.

The judgment of the court below is reversed, and the cause sent back with directions to issue a *venire de novo*.

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M'Arthur v. Porter. 6 P.

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DUNCAN M'ARTHUR, Plaintiff in Error, v. WESLEY S. PORTER, Defendant in Error.

6 P. 205.

In an action of ejectment for a tract of land, described in the declaration by metes and bounds, the jury may find a verdict for the plaintiff as to part of the tract, and for the defendant as to the residue; and if they do so, the judgment should conform to the verdict. It is error for the court to order a general verdict and judgment for the whole land, upon such a finding.

THE case is stated in the opinion of the court.

*Vinton* and *Doddridge*, for the plaintiff.

*Ewing*, contra.

\* STORY, J., delivered the opinion of the court.

[ \* 210 ]

This is a writ of error to the circuit court for the district of Ohio. The original action was an ejectment, brought by the defendant in error against the plaintiff in error, and the declaration (which contains several counts) describes the land demanded by specific metes and bounds. At the trial, the jury found a verdict in the following terms: "We, the jury, find the defendant guilty of the trespass in the plaintiff's declaration \* mentioned, and [ \* 211 ] do assess the plaintiff's damages to one cent, and that the plaintiff do recover of the defendant the land described as follows, viz: beginning at the stone planted in Spencer's orchard, designated on Looker's map (referring to the diagram and report of the survey in court) by the letter B; thence running in a northwesterly direction to a point in Dock's line, 124 poles; eastwardly on Dock's line from the point marked D on Looker's map, a hickory and dogwood, thence westwardly with Dock's line 124 poles, to the hickory and dogwood aforesaid; thence running in a southwesterly direction to Taliaferro's line to the place of beginning." The counsel for the plaintiff then moved the court to instruct the jury to find a general verdict; and thereupon the court did instruct the jury to find a general verdict, saying that the plaintiff would take possession at his peril; which general verdict was found by the jury accordingly, and to this instruction the defendant excepted. Other exceptions were taken in the progress of the trial, but they have been abandoned at the argument, and the only question presented for our consideration is upon the instruction already mentioned.

From the survey ordered by the court, as well as from the other proceedings and evidence in the cause, it abundantly appears that the case was one of conflicting titles, and the controversy was prin-

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pally as to boundaries. The verdict of the jury, as originally found, was for part only of the land sued for in the ejectment; fixing upon an intermediate line of boundary, different from that asserted by either party. It was, therefore, equivalent to a verdict finding a part of the tract of land sued for in favor of the plaintiff, and the residue in favor of the defendant. In other words, that the defendant was guilty of the ejectment as to a part, and not guilty as to the residue of the land described in the declaration.

The real question, then, before the court is, whether the plaintiff, upon the proof of a title to a part of the premises sued for in the ejectment, is by law entitled to a general verdict for the whole of the premises sued for. That the action of ejectment is a fictitious action, and is moulded by courts to subserve the purposes of justice in a

manner peculiar to itself, is admitted, but its professed object [ \*212 ] is to try the titles of the parties ; \*and the jury are bound to

pass upon those titles, as they are established by the evidence before them. They, therefore, do no more than their duty when they find a verdict for the plaintiff, according to the extent and limits of his title, as it is proved by the evidence. It is equally their right so to do, since it is comprehended in the issue submitted to their decision. If, therefore, they find by their verdict according to the truth of the case, that the plaintiff has title to part only of the premises in the declaration, and describe it by metes and bounds, and that so far the defendant is guilty ; and as to the residue, find the issue for the defendant ; such a verdict, in point of law, would seem to be unexceptionable ; and if so, the judgment following that verdict ought to conform to it ; and if it should be a general judgment for the whole premises demanded in the declaration, it would be erroneous. Such, upon principle, and the analogies of the common law, would be the just result ; and the authorities clearly establish the doctrine, and it is confirmed as a matter of practice by the best text-writers on the subject ; Adams on Ejectment, 294 ; Runnington on Ejectment, 432 ; Bac. Abridg. Ejectment, F. G. Thus, in *Mason v. Fox*, Cro. Jac. 632, where in an ejectment the jury found the defendant guilty as to part of the premises in the declaration, and not guilty as to the residue, all the judges were of opinion that the judgment ought to conform to the verdict, for it was consequent upon the verdict ; but that an entry of a general or variant judgment was not a misprision of the clerk, and amendable even after error brought. In *Denn d. Burgess v. Purvis*, 1 Burr. 326, the plaintiff sued for a moiety of a certain parcel of land, and had a verdict for one third part of the premises ; and the question was whether, in such a case, the plaintiff could recover for a less undivided part than he sued for. The court held

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that she could, and that she was entitled to a judgment for the one third. Lord Mansfield on that occasion said, the rule undoubtedly is that the plaintiff must recover according to his title. Here she demanded half, and she appears entitled to a third, and so much she ought to recover; so, if you demand forty acres, you may certainly recover twenty acres; every day's experience proves this. And, he added, that the case of Ablett *v.* Skinner, 1 Sid. 229, was directly in point. In 2 Roll. Abridg. tit. Trial, p. 704, \* pl. [ \*213 ] 22, there is a case where an ejectment was brought of a messuage, and it appeared in evidence and was so found by the verdict, that only a small part of the messuage was built by encroachment on the lessor's land, not the residue. And the plaintiff had judgment for the parcel accordingly. Taylor *v.* Wilbore, Cro. Eliz. 768. These authorities (and the American authorities cited at the bar are to the same effect) demonstrate that the plaintiff is entitled to recover only according to his title; and that, if he shows a title to part only, he is entitled to have a verdict and judgment for that part, and no more. If this be the true state of the law, then the jury were right in their original verdict; and the instruction of the court, that they should find a general verdict (the plaintiff having established a title to only a part of the land) was erroneous.

But it has been argued that such a general verdict, under such circumstances, is a matter of mere practice, and involves no inconvenience or repugnancy to the general principles of law, because the plaintiff must still at his peril take possession under his executor, upon a general judgment on such verdict, according to his title. That the whole proceedings in ejectment are founded in fictions, and the court will, in a summary manner, restrain the plaintiff if he takes possession for more than his title, so that no injustice can be done to the defendant. And certain authorities have been relied upon in support of these suggestions. But in what manner can the court, in a case circumstanced like the present, interfere with the plaintiff in taking possession. If the special finding of the jury in the case of interfering titles on a question of boundary, which may, and indeed usually does involve a comparison of the conflicting testimony of witnesses and other parol evidence, is to be set aside and disregarded, there is nothing upon the record to guide the plaintiff in regard to the extent of his title in taking possession; and he must be at liberty to take possession according to his own view of the extent of his title; nor can the court have, in such a case, any certain means to interfere, upon a summary application to redress any supposed excess of the plaintiff, for that would be in matters of fact to usurp the functions of a jury, and to re-try the cause upon its facts and merits, without

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their assistance. It might be different in a case where the [ \*214 ] plaintiff's title, as he proved it at the trial, was, \* upon his own showing, less than the lands of which he had taken possession; for that would involve no examination or decision upon conflicting matters of fact; and after all, what could this be but an attempt, indirectly, to do that justice between the parties, which the original verdict sought to do directly, and in a manner entirely conformable to law?

As to the authorities relied on to sustain the practice of entering a general verdict, they do not in our opinion justify the doctrine for which they are cited. The language cited from Adams on Ejectment, p. 297, has been misunderstood. It does not mean that where the plaintiff obtains a verdict for a part of the premises only, he is entitled to a general judgment for the whole premises sued for; for that would be inconsistent with what the author has said in a preceding page (p. 294); but only that the same form of entering the judgment for the parcel recovered is adopted as in cases where the whole is recovered; as, for example, if the plaintiff declares for forty acres in it, and he recovers only twenty acres, his judgment must be for the twenty acres; and it is at his peril that he takes out execution for no more than he has proved title to, since otherwise his execution would be bad, as not conforming to the judgment. The case of *Cottingham v. King*, 1 Burr. 621, was the case of a writ of error from Ireland, and the only question was whether the declaration, which was for five thousand messuages, five thousand cottages, &c., a quarter of land, &c., &c., was not void for uncertainty; a general verdict having been given for the plaintiff. One objection was, that the declaration was too uncertain to enable the sheriff to deliver possession, to which Lord Mansfield replied that, in this fictitious action, the plaintiff is to show the sheriff, and is to take possession at his peril of only what he was entitled to. If he takes more than he has recovered and shown title to, the court will, in a summary way, set it right. Now it is plain that his lordship was here addressing himself to a case where the declaration was general, and the verdict was general, for the whole premises; and not to a case where there was

a verdict for a specified parcel only of the premises. In the [ \*215 ] case \*put, the judgment would be general, and the execution would conform to it; and therefore if the plaintiff took possession beyond his own title established at the trial, the court might interfere in a summary manner to prevent such a general recovery from working injustice. The same doctrine was afterwards held in *Connor v. West*, 5 Burr. 2672. But neither of these cases has any tendency to show that, upon proof of title to part of the prem-

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*Ex parte* Roberts and *Ex parte* Adshead. 6 P.

ises, the plaintiff is entitled, as a matter of right, to a general verdict and judgment for the whole premises in the declaration. Such a point was never argued, nor considered by the court.

The case of *Kouns v. Lawall, Lessee of Grayson*, cited from 2 Bibb, 236, approaches nearer to the present. Without meaning to express any opinion as to the correctness or incorrectness of the decision in that case, it is sufficient to say that it is distinguishable from the case now before us. In that case, the court held the special finding of the jury void for uncertainty, and rejected it as surplusage; and then considered the finding of the jury as a general verdict for the plaintiff, upon which he might properly have a general judgment. No such objection occurs against the special finding in the present case, and we may decide it without touching the authority of that decision.

Upon the whole, our opinion is, that the instruction of the circuit court was erroneous. It was not a mere matter of practice, but one involving essential rights of the defendant.

The judgment is therefore reversed, and the cause is to be remanded to the circuit court, with directions to award a *venire facias de novo*.

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**EX PARTE JOSEPH ROBERTS, AND EX PARTE GEORGE ADSHEAD.**

6 P. 216.

An application to a district court, to set aside a default and inquisition, is to the discretion of that court, and its refusal is not a proper subject of a writ of *mandamus*.

**MOTION FOR A MANDAMUS** to the judge of the district court of the United States for the southern district of New York, commanding him to set aside a default and an inquest taken thereon, upon an information to enforce the forfeiture of certain goods, seized for a breach of the revenue laws.

*Beardsley*, for the motion.

\* MARSHALL, C. J., delivered the opinion of the court. [ \* 217 ]

The court is of opinion that the present is not a proper case for the interposition of this court, by way of *mandamus*. The application to set aside the default and inquest, was an application to the discretion of the district court; and is not distinguishable in principle from applications to grant new trials. This court has always considered such applications as resting in the sound discretion of the court where the cause is depending, and not a matter for a *mandamus* or writ of error.

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Grant v. Raymond. 6 P.

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JOSEPH GRANT and others v. E. & H. RAYMOND.

6 P. 218.

Though this court does not regulate the discretion of the court below as to granting a new trial, yet where a case came up on a certificate of division of opinion whether a new trial should be granted, and the division was upon the same points raised by bills of exception taken at the trial and contained in the record, the court allowed the argument to proceed, reserving its judgment until a writ of error was sued out.

The laws passed to secure to inventors an exclusive right to their inventions, ought to be construed in the spirit in which they were made.

Under the patent act of 1793, February 21, (1 Stats. at Large, 318,) the secretary of state had power to receive a surrender of a patent, cancel the record thereof, and issue a new patent for the unexpired portion of the term, when the defect in the specification arose from mistake, without fraud or misconduct of the patentee.

Though under the 6th section of the act of 1793, a judgment avoiding the patent cannot be entered unless the concealment or addition shall appear to have been made for the purpose of deceiving the public, yet no action will lie if the specification is defective under the 3d section.

BEFORE this case came on for argument, Mr. Webster inquired if the court would hear it on a certificate of a division of opinion of the judges of the circuit court of the United States for the southern district of New York, on a motion for a new trial, in a case where a bill of exceptions was taken at the trial, presenting the same points on which the judges had differed. He suggested that jurisdiction had been taken where the judges differed on a motion for a new trial.

[ \* 221 ] \* STORY, J. In the cases referred to, the division of the court took place on the trial of the cause before the jury, as well as on the motion for a new trial.

MARSHALL, C. J., suggested that the case might be brought on if the parties would agree that it should stand as if a judgment had been given by the circuit court on the exceptions. The case he said, could not be heard on a difference in opinion of the judges of the court, on a motion for a new trial.

An agreement in writing, to the effect suggested by the chief justice, having been filed, the court made the following order.

It is now here by the court considered and ordered, that this cause shall now be heard and decided, as on a writ of error brought after verdict and judgment in the circuit court, on the exceptions which were taken in that court; that the cause shall now proceed as if judgment had been actually entered in the circuit court for the plaintiffs there; and that the certificate in the case shall be taken, regarded, and treated as a writ of error, sued out by the defendants below, on the judgment of the circuit court; and that the question shall be, as in other cases, whether the said judgment ought to be reversed or

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affirmed, but that this court will reserve its opinion and judgment in this cause till the defendants in the court below shall have sued out a writ of error in this cause to the said circuit court, and filed a return thereto, with a bill of exceptions in this cause, in the usual form, signed by the court below, in this court.

*Webster, for Raymond.*

*Ogden, contra.*

MARSHALL, C. J., delivered the opinion of the court.

\* This action was brought by Grant and Townsend against [ \* 239 ] E. and H. Raymond, to recover damages for an infringement of their right, under a patent granted to the plaintiff, Joseph Grant, in April, 1825. It recited that a former patent had been issued in August, 1821, to the same person, for the same improvement, "which had been cancelled, owing to the defective specification on which the same was granted." The exclusive privilege given by the patent on which the suit is brought, is to continue fourteen years from the day on which the original was issued.

One of the pleas filed by the defendants, contained the following averment : " And the defendants aver that said specification does not correctly or accurately describe the improvement claimed by the said Joseph Grant as his invention; but said specification, and the drawings thereto annexed, are altogether defective in this, among other things, namely : in said specification, no proportions, sizes, or distances are given, and the bigness or size of none of the principal parts of said machine is given in said specifications or drawings, but the same is wholly omitted ; and in other particulars said specifications and drawings are wholly defective, and the defendants aver that said specification annexed to and making part of said letters-patent, with the drawings thereto annexed, do not contain a written description of his the said Joseph Grant's invention and improvement aforesaid, and manner of using it, in such full, clear, and exact terms, as to distinguish the same from all other things before known, and so as to enable any person skilled in the art of which said machine or improvement is a branch, or with which it is most nearly connected, to make and use the same ; and that, for the cause aforesaid, said letters-patent are void."

The plaintiffs reply that they ought not to be barred, " because they say that the specification mentioned in the said last-mentioned plea, does correctly and accurately describe the improvement claimed by the said Joseph Grant as his invention ; and because, they say

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further, that neither the said specification, nor the drawings thereto annexed, are defective in any of the particulars in that behalf alleged in the said last-mentioned plea, and this they pray may be inquired of by the country." On this replication issue was joined.

[ \* 240 ] "At the trial, the counsel for the defendants objected that the secretary of state had no power by law to accept a surrender of, and to cancel the said letters-patent, or to inquire into or to decide upon the causes for so doing, or to grant said second patent for the same invention with an amended specification, for the unexpired portion of the term of fourteen years which had been granted by the first patent.

The court decided that such surrender might be made when the defect arose from inadvertence or mistake, and without any fraud or misconduct on the part of the patentee; and that the secretary of state had authority to accept such surrender, and cancel the record of the patent, and to issue a new patent for the unexpired part of the fourteen years granted under the old patent, in manner aforesaid To which decision the counsel for the defendants excepted.

After adducing the testimony on which they relied to support their plea hereinbefore stated, the counsel for the defendants moved the court to instruct the jury that if they found that the defendants had maintained and proved their averments in that respect, that they must find the same for the defendants; which instructions the court refused to give, but instructed the jury that the patent would not be void on this ground, unless such defective or imperfect specification or description arose from design, and for the purpose of deceiving the public; to which opinion the counsel for the defendants also excepted.

The jury found a verdict for the plaintiffs, and assessed their damages to \$3,266.66, the judgment on which is brought before this court by a writ of error.

The first question in the cause respects the power of the secretary of state to receive a surrender of a patent, cancel the record thereof, and issue a new patent for the unexpired part of the fourteen years for which the original had been granted. The court was of opinion that this might be done "when the defect in the specification arose from inadvertence or mistake, and without any fraud or misconduct on the part of the patentee."

The right of the patentee to surrender his patent has not been denied, but the plaintiffs in error insist that no power exists [ \* 241 ] to grant a new patent for the unexpired term. The \* words of the act, they say, do not confer this power. It cannot be exercised with its necessary guards by the department of state; and inconvenience of no inconsiderable magnitude might result to the

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public from its exercise. The secretary of state is, in the act of making out patents, a mere ministerial officer, and can exercise no power which is not expressly given.

It is undoubtedly true that the secretary of state may be considered, in issuing patents, as a ministerial officer. If the prerequisites of the law be complied with, he can exercise no judgment on the question whether the patent shall be issued. It is equally true that the act of congress contains no words which expressly authorize the secretary to issue a corrected patent, if the original, from some mistake or inadvertence in the patentee, should be found incompetent to secure the reward which the law intended to confer on him for his invention. The force of this objection, and of the argument founded on it, is felt. If the new patent can be sustained, it must be on the general spirit and object of the law, not on its letter.

To promote the progress of useful arts is the interest and policy of every enlightened government. It entered into the views of the framers of our constitution; and the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries," is among those expressly given to congress. This subject was among the first which followed the organization of our government. It was taken up by the first congress at its second session, and an act<sup>1</sup> was passed authorizing a patent to be issued to the inventor of any useful art, &c. on his petition, "granting to such petitioner, his heirs, administrators, or assigns, for any term not exceeding fourteen years, the sole and exclusive right and liberty of making, using, and vending to others to be used, the said invention or discovery. The law further declares that the patent "shall be good and available to the grantee or grantees, by force of this act, to all and every intent and purpose herein contained." The amendatory act of 1793, contains the same language; and it cannot be doubted that the settled purpose of the United States has ever been, and continues to be, to confer on the authors of useful inventions an exclusive right in their inventions for the time mentioned in their patent. It is \*the reward stipulated for the advantages [ \* 242 ] derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made; and to execute the contract fairly on the part of the United States, where the full benefit has been actually received, if this can be done without transcending

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<sup>1</sup> 1 Stats. at Large, 109.

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the intention of the statute, or countenancing acts which are fraudulent or may prove mischievous. The public yields nothing which it has not agreed to yield; it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved, and for his exclusive enjoyment of it during that time the public faith is pledged. That sense of justice and of right which all feel, pleads strongly against depriving the inventor of the compensation thus solemnly promised, because he has committed an inadvertent or innocent mistake.

If the mistake should be committed in the department of state, no one would say that it ought not to be corrected. All would admit that a new patent, correcting the error, and which would secure to the patentee the benefits which the law intended to secure, ought to be issued. And yet the act does not in terms authorize a new patent, even in this case. Its emanation is not founded on the words of the law, but is indispensably necessary to the faithful execution of the solemn promise made by the United States. Why should not the same step be taken for the same purpose, if the mistake has been innocently committed by the inventor himself?

The counsel for the plaintiffs in error have shown very clearly that the question of inadvertence or mistake is a judicial question, which cannot be decided by the secretary of state. Neither can he decide those judicial questions on which the validity of the first patent depends. Yet he issues it without inquiring into them. Why may he not, in like manner, issue the second patent also? The correct performance of all those preliminaries on which the validity of the original depends, are always examinable in the court in which a suit for its violation shall be brought. Why may not those points on

which the validity of the amended patent depends, be examined \* before the same tribunal? In the case under

consideration, those questions were not supposed by the circuit court to have been decided in the department of state, but were expressly submitted to the jury. The rightfulness of issuing the new patent is declared to depend on the fact that "the defect in the specification arose from inadvertence or mistake, and without any fraud or misconduct on the part of the patentee." The jury were of course to inquire into the fact. The condition on which the right to issue the patent depended, could be stated to them for no other purpose.

It has been said that this permission to issue a new patent on a reformed specification, when the first was defective through the mistake of the patentee, would change the whole character of the act of congress.

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We are not convinced of this. The great object and intention of the act is to secure to the public the advantages to be derived from the discoveries of individuals, and the means it employs are the compensation made to those individuals for the time and labor devoted to these discoveries, by the exclusive right to make, use, and sell the things discovered, for a limited time. That which gives complete effect to this object and intention, by employing the same means for the correction of inadvertent error which are directed in the first instance, cannot, we think, be a departure from the spirit and character of the act.

An objection much relied on, is, that, after the invention has been brought into general use, those skilled in the art or science with which it is connected, perceiving the variance between the specification and the machine, and availing themselves of it, may have constructed, sold, and used the machine without infringing the legal rights of the patentee, or incurring the penalties of the law. The new patent would retroact on them, and expose them to penalties to which they were not liable when the act was committed.

This objection is more formidable in appearance than in reality. It is not probable that the defect in the specification can be so apparent as to be perceived by any but those who examine it for the purpose of pirating the invention. They are not entitled to much favor. But the answer to the objection is, that this defence is not made in this case; and the \*opinion of the circuit court [ \*244 ] does not go so far as to say that such a defence would not be successful. That question is not before the court, and is not involved in the opinion we are considering. The defence, when true in fact, may be sufficient in law, notwithstanding the validity of the new patent.

It has been also argued that the new patent must issue on the new specification, and on the application which accompanies it. Consequently, it will not be true that the machine was "not known or used before the application."

But the new patent, and the proceedings on which it issues, have relation to the original transaction. The time of the privilege still runs from the date of the original patent. The application may be considered as appended to the original application, and, if the new patent is valid, the law must be considered as satisfied if the machine was not known or used before that application.

It has been urged that the public was put into possession of the machine by the open sale and use of it under the defective specification, and cannot be deprived of it by the grant of a new patent. The machine is no longer the subject of a patent.

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This would be perfectly true, if the second patent could be considered as independent of the first. But it is in no respect so considered. The communication of the discovery to the public has been made in pursuance of law, with the intent to exercise a privilege which is the consideration paid by the public for the future use of the machine. If, by an innocent mistake, the instrument introduced to secure this privilege fails in its object, the public ought not to avail itself of this mistake, and to appropriate the discovery without paying the stipulated consideration. The attempt would be disreputable in an individual, and a court of equity might interpose to restrain him.

It will not be pretended that this question is free from difficulty. But the executive departments, it is understood, have acted on the construction adopted by the circuit court, and have considered it as settled. We would not willingly disregard this settled practice, in a case where we are not satisfied it is contrary to law, and where we are satisfied that it is required by justice and good faith.

[ \* 245 ] \* We will now proceed to the second exception.

The plea assigns the particular defect supposed to exist in the specification, and then proceeds to aver, in the very words of the act, that it "does not contain a written description of his, the said Joseph Grant's invention and improvement aforesaid, and manner of using it, in such full, clear, and exact terms as to distinguish the same from all other things before known, and so as to enable any person skilled in the art, &c., to make and use the same," &c.

The plea alleges, in the words of the act, that the prerequisites to the issuing a patent had not been complied with.

If the matter alleged in this plea constituted no bar to the action, the plaintiffs might have demanded, and have submitted the question of law to the court. But they have chosen to deny the facts alleged in the plea, and to aver in their replication, "that neither the specification nor the drawings thereto annexed, are defective in any of the particulars in that behalf alleged." Issue was joined upon this replication; and it is that issue which the jury were sworn to try.

At the trial, the counsel for the defendants, after the evidence was closed, asked the court, in substance, to instruct the jury that, if they should be of opinion that the defendants had maintained and proved the facts alleged in their plea, they must find for the defendants. The court refused this instruction. Ought it to have been refused? If, in the opinion of the jury, the defendants have proved and maintained every fact alleged in the plea on which the issue they are sworn to try is joined, ought not the jury to find that issue for the defendants? Is not this required by their oaths? The conclusion, "and that, for the cause aforesaid, said letters-patent are void," is an inference of

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law from the facts previously alleged; not the allegation of a distinct fact to be submitted to the jury.

The court proceeded to instruct the jury "that the patent would not be void on this ground, unless such defective or imperfect specification or description arose from design, or for the purpose of deceiving the public.

Now, this "design," this "purpose of deceiving the public," constituted no part of the issue. The defendants had not alleged it, and could not be supposed to come prepared to prove it. A verdict for them would not imply it. The instruction is  
•understood to direct a verdict which finds in fact that the [ \*246 ] description or specification is not defective; and this verdict against the evidence is to be found because that defect "arose not from design, or for the purpose of deceiving the public."

But we must inquire whether the instruction, independent of its departure from the issue, be consistent with law. It is "that the patent would not be void unless," &c.

The 5th section of the act gives the party aggrieved an action for the infringement of his patent right. The 6th provides "that the defendant in such action shall be permitted to plead the general issue, and give this act in evidence, and to give in evidence any special matter, of which notice in writing may have been given to the plaintiff or his attorney thirty days before trial, tending to prove that the specification filed by the plaintiff, does not contain the whole truth relative to his discovery, or that it contains more than is necessary to produce the described effect; which concealment or addition shall fully appear to have been made for the purpose of deceiving the public; or that the thing thus secured," &c.; "in either of which cases judgment shall be rendered for the defendant, with costs, and the patent shall be declared void."

Courts did not, perhaps, at first distinguish clearly between a defence which would authorize a verdict and judgment in favor of the defendant in the particular action, leaving the plaintiff free to use his patent, and to bring other suits for its infringement; and one which, if successful, would require the court to enter a judgment, not only for the defendant in the particular case, but one which declares the patent to be void. This distinction is now well settled.

If the party is content with defending himself, he may either plead specially, or plead the general issue, and give the notice required by the 6th section, of any special matter he means to use at the trial. If he shows that the patentee has failed in any of those prerequisites on which the authority to issue the patent is made to depend, his defence is complete. He is entitled to the verdict of the jury and the

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judgment of the court. But if, not content with defending himself, he seeks to annul the patent, he must proceed in precise conformity to the 6th section. If he depends on evidence "tending [ \*247 ] to prove that the specification filed by the plaintiff \*does not contain the whole truth relative to his discovery, or that it contains more than is necessary to produce the described effect," it may avail him so far as respects himself, but will not justify a judgment declaring the patent void, unless such "concealment or addition shall fully appear to have been made for the purpose of deceiving the public;" which purpose must be found by the jury to justify a judgment of *vacatur* by the court. The defendant is permitted to proceed according to the 6th section, but is not prohibited from proceeding in the usual manner, so far as respects his defence; except that special matter may not be given in evidence on the general issue unaccompanied by the notice which the 6th section requires. The 6th section is not understood to control the 3d. The evidence of fraudulent intent is required only in the particular case, and for the particular purpose stated in the 6th section.

This instruction was material if the verdict ought to have been for the defendants, provided the allegations of the plea were sustained, and if such verdict would have supported a judgment in their favor; although the defect in the specification might not have arisen from design, and for the purpose of deceiving the public. That such is the law, we are entirely satisfied. The 3d section requires, as preliminary to a patent, a correct specification and description of the thing discovered. This is necessary in order to give the public, after the privilege shall expire, the advantage for which the privilege is allowed, and is the foundation of the power to issue the patent. The necessary consequence of the ministerial character in which the secretary acts is, that the performance of the prerequisites to a patent must be examinable in any suit brought upon it. If the case was of the first impression, we should come to this conclusion; but it is understood to be settled.

The act of parliament concerning monopolies contains an exception on which the grants of patents for inventions have issued in that country. The construction of so much of that exception as connects the specification with the patent, and makes the validity of the latter dependent on the correctness of the former, is applicable, we think, to proceedings under the 3d section of the American act. The [ \*248 ] English books \*are full of cases in which it has been held that a defective specification is a good bar, when pleaded to, or a sufficient defence when given in evidence on the general issue, on an action brought for the infringement of a patent-right.

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They are very well summed up in Godson's Law of Patents, title Specification; and also in the chapter respecting the infringement of patents; also in Holroyd on Patents, where he treats of the specification, its form, and requisites. It is deemed unnecessary to go through the cases, because there is no contrariety in them, and because the question is supposed to be substantially settled in this country. Pennoch and Sellers *v.* Dialogue, 2 Pet. 1, was not, it is true, a case of defect in the specification or description required by the 3d section, but one in which the applicant did not bring himself within the provision of the 1st section, which requires that, before a patent shall issue, the petitioner shall allege that he has invented a new and useful art, machine, &c., "not known or used before the application."

This prerequisite of the 1st section, so far as a failure in it may affect the validity of the patent, is not distinguishable from a failure of the prerequisites of the 3d section.

On the trial, evidence was given to show that the patentee had permitted his invention to be used before he took out his patent. The court declared its opinion to the jury that, if an inventor makes his discovery public, he abandons the inchoate right to the exclusive use of the invention. "It is possible," added the court, "that the inventor may not have intended to give the benefit of his discovery to the public." "But it is not a question of intention," "but of legal inference, resulting from the conduct of the inventor, and affecting the interests of the public. It is for the jury to say whether the evidence brings this case within the principle which has been stated. If it does, the court is of opinion that the plaintiff is not entitled to a verdict."

The jury found a verdict for the defendants, an exception was taken to the opinion, and the judgment was affirmed by this court.

This case affirms the principle that a failure on the part of the patentee, in those prerequisites of the act which authorize a patent, is a bar to a recovery in an action for its infringement; and that the validity of this defence does not depend on \*the [ \*249 ] intention of the inventor, but is a legal inference upon his conduct.

Upon these authorities and this reasoning we are of opinion that the instruction was erroneous, and that the judgment ought to be reversed and the cause remanded. One of the judges composing the majority thinks that the direction would have been erroneous on a plea properly framed upon the 3d section of the act, and averring the facts of a defective specification, and a non-compliance with other requisitions of that section, for that such a plea would be a good bar and defence to the action; but, in his view, the plea relies upon the

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facts as avoiding the patent entirely, and avers it to be void. He thinks, however, that the replication puts the facts, and not the point whether void or not, in issue; and that the direction of the court was erroneous, since it was equivalent to a declaration that, if all the facts were proved, the issue ought not to be found for the defendants, unless the imperfection of the specification arose from a fraudulent design.

The judgment is reversed, and the cause remanded, with directions to issue a *venire facias de novo*.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of New York, and was argued by counsel. On consideration whereof, it is the opinion of this court that the said circuit court erred in instructing the jury "that the patent would not be void on this ground, unless such defective or imperfect specification or description arose from design, and for the purpose of deceiving the public." Whereupon it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby reversed, and that this cause be, and the same is hereby remanded to the said circuit court, with directions to award a *venire facias de novo*.

7 P. 292; 1 H. 202; 4 H. 646; 6 H. 487; 7 H. 185; 15 H. 330; 17 H. 74; 2 Wal. 591.

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THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF THE  
UNITED STATES, Plaintiffs in Error, v. WILLIAM S. HATCH, De-  
fendant in Error.

6 P. 250.

Notice to an indorser, left with a fellow-boarder at a private boarding-house, where the indorser lodged, he being absent, is sufficient.

A contract by the holder with the drawer of a bill, for a valuable consideration, to continue an action against the latter, founded on the bill, to the next term, discharges the indorser.

THE case is stated in the opinion of the court.

*Sergeant and Webster*, for the plaintiffs.

*Ewing*, contra.

[ \* 254 ] \* STORY, J., delivered the opinion of the court.

This is a writ of error to the circuit court of Ohio.

The Bank of the United States, as holders, brought an action upon a bill of exchange, jointly against Elijah Pearson as drawer,

[ \* 255 ] and against William S. Hatch as indorser, under a \* statute of Ohio authorizing such a proceeding. The marshal hav-

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ing returned the writ "not found" as to Hatch, the bank proceeded to take judgment against Pearson alone. The present suit is a *scire facias* against Hatch to make him a party to the same judgment, so that execution may also issue against him, according to the provisions of the same statute. The declaration and bill of exchange in the original proceedings have not been, as they ought to have been, sent up in the record, as they constitute a part of it; and for this imperfection a *certiorari* ought to have been awarded, if any thing material in it were now controverted by the parties. It appears from some exhibits in the proceedings, that the bill of exchange was dated at Cincinnati, on the 23d of May, 1820, and was as follows: "Sixty days after date hereof, pay to the order of William S. Hatch, at the office of discount and deposit of the Bank of the United States at Cincinnati, \$6,600, which charge to the account of, Yours, respect fully, E. Pearson." Addressed, "Mr. Thomas Graham, Cincinnati, Ohio." It was indorsed by Hatch, and accepted by Graham. Hatch pleaded the general issue, *non assumpsit*; and at the trial the jury found a special verdict, as follows:—

"And afterwards, to wit, at the December term of said court, in the year last aforesaid, came the parties, by their said attorneys; and thereupon, for trying the issue joined, came a jury, to wit: William B. Van Hook, David Todd, John Larwell, Randall Stiver, Isaac N. Norton, A. R. Chase, Truman Beecher, J. R. Geddings, William Rayne, William A. Needham, Ira Paige, and William A. Johnson, who, being empanelled, elected, tried, sworn, and affirmed, to try the issue between the parties, upon their oath do say, that E. Pearson made the bill of exchange, a copy of which is attached to the declaration of the said plaintiffs in the original suit against said Pearson, the drawer of said bill, and that the said bill was regularly indorsed by the present defendant Hatch. They also find that on the 25th day of July, in the year 1820, said bill of exchange was duly protested for non-payment, and that on said day last mentioned, and on the succeeding day, the said defendant Hatch was boarding at the house of Henry Bainbridge, in the city of Cincinnati; that on the 26th day of July, in the year 1820, the notary public by \*whom said bill was protested called at the house of said [ \*256 ] Bainbridge, and inquired for said Hatch, and was informed by a Mr. Young that said Hatch was not within; the said notary then left a written notice of said protest with said Young, who was at that time in the house aforesaid, and requested him to deliver said notice to said Hatch; and that, in the summer of said year 1820, said Young was a boarder at said house. They also find that a suit was commenced against said Pearson, the drawer of said bill of

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exchange, which suit stood for trial at the September term, in the year 1822, of the circuit court of the United States for the district of Ohio. They also find that, previous to the year 1822, one Griffin Yeatman was confined on the jail limits of Hamilton county, in said State, on a *ca. sa.*, issued at the instance of, and on a judgment in favor of, said Pearson. That said Yeatman was a material witness for the plaintiff, in a number of suits then pending in said court; that one George W. Jones, who was the then agent for plaintiffs, and one William M. Worthington, the then attorney for the plaintiffs, agreed with the said Pearson, that, in consideration, he, the said Pearson, would permit the said Yeatman to leave the said jail limits, and attend said court during the term aforesaid, then the suit then pending in said court against said Pearson, on said bill of exchange, should be continued without judgment, until the term of said court next ensuing said September term, A. D. 1822. That, in pursuance of this agreement, the said Pearson permitted the said Yeatman to leave said jail limits, and attend said court; and that said suit against said Pearson was continued, agreeably to said agreement. Now, therefore, if upon this finding, the court shall be of opinion that the plaintiff is entitled to judgment, then the jury find for the plaintiff, to recover of the defendant the amount of said bill, together with the interest thereon; but if the court shall be of opinion, upon the said finding, that the defendant is entitled to a judgment, then, and in that case, the jury find for the defendant."

Upon this special verdict, the court below gave judgment for the defendant.

Two questions, arising out of the special verdict, have been argued at the bar. First, whether the notice to Hatch, of the dis-  
[\* 257] honor of the bill, was sufficient. Secondly, if it *\*was*, whether the agreement between the bank and Pearson was a discharge of the indorser.

Upon the first point, we are of opinion that the notice was sufficient. In cases of this nature, the law does not require the highest and strictest degree of diligence in giving notice, but such a degree of reasonable diligence as will ordinarily bring home notice to the party. It is a rule founded upon public convenience and the general course of business; and only requires that, in common intendment and presumption, the notice is by such means as will be effectual. In the present case, the notice was left at a private boarding-house where Hatch lodged, which must be considered, to all intents and purposes, his dwelling-house. It was left, then, at the proper place; and if the delivery had been to the master of the house or to a servant of the house, there could be no doubt that it would have been

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sufficient. *Stedman v. Gooch*, 1 Esp. 3. The notary called at the house, and, upon inquiry of a fellow-boarder and inmate of the house, he was informed that Hatch was not within. He then left the notice with the fellow-boarder, requesting him to deliver it to Hatch.

The latter must necessarily be understood, by receiving the notice under such circumstances, impliedly to engage to make the delivery. The question, then, is, whether such a notice, so delivered, does not afford as reasonable a presumption of its being received as if delivered to a tenant of the house. This is not like the case of a public inn, and a delivery to a mere stranger who happens to be there *in transitu*, and cannot be presumed to have any knowledge or intercourse with the party. Boarders at the same house may be presumed to meet daily, and to feel some interest in the concerns of each other, and to perform punctually such common duties of civility as this. In our large cities, many persons engaged in business live at boarding-houses in this manner. It is not always easy to obtain access to the master of the house, or to servants who may be safely intrusted with the delivery of notices of this sort. A person who resides in the house, upon a footing of equality with all the guests, may well be supposed to feel a deeper interest in such matters than a mere servant, whose occupations are pressing and various, and whose pursuits do not lead him \* to place so high a value upon a [ \*258 ] scrupulous discharge of duty. We think that a stricter rule would be found inconvenient, and tend to subvert rather than to subserve the purposes of justice. No case exactly in point has been cited at the bar. That of *Stedman v. Gooch*, 1 Esp. 3, approaches near to it; but there the notice was left with the woman who kept the house at which the party was a lodger. No stress, however, seems to have been laid upon this circumstance, to distinguish it from the case of a delivery to any other inmate of the house, either servant or fellow-boarder.

The other question is one of more nicety, and not less important. It appears from the special verdict that the contract with Pearson, for the continuance of the suit on this very bill, without judgment, until the next term of the circuit court, was for a valuable consideration, and not a mere voluntary and discretionary exercise of authority on the part of the agents of the bank. What, then, is to be deemed the true construction of it? Did it amount to no more than an agreement that that particular suit should stand continued, leaving the bank at full liberty to discontinue that on the morrow, at their discretion, and to commence a new suit and new proceedings for the same debt? Or was it intended by the parties to suspend the enforcement of any remedy for the debt for the stipulated period,

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and rely solely on that suit for a recovery? We are of opinion that the intention of the parties, apparent on the contract, was to suspend the right to recover the debt until the next term of the court. It is scarcely possible that Pearson should have been willing to give a valuable consideration for the delay of a term, and yet have intentionally left avenues open to be harassed by a new suit in the interval. Indeed, no other remedy, except in that particular suit, seems to have been within the contemplation of either party. If the bank had engaged, for a like consideration, not to sue Pearson on the bill for the same period, there could have been no doubt that it would be a contract suspending all remedy. What substantial difference is there between such a contract and a contract to suspend a suit already commenced, which is the only apparent remedy for the recovery of the bill during the same period? Is it not the natural, nay, necessary intendment, that the defendant shall have the full benefit of the whole period \* as a delay of payment of the debt? It is no answer that a new suit would be attended with more delay. That might or might not be the case, according to the different course of practice in different States; and, at all events, it would harass the party with new expenses of litigation. But the true inquiry is, whether the parties did or did not intend a surceasing of all legal proceedings during the period. We think that the just and natural exposition of the contract is, that they did.

If this, then, be the correct exposition of the contract, the case clearly falls within the principle laid down by this court in *M'Lemore v. Powell*, 12 Wheat. 554. That was the case of a voluntary agreement, without consideration, by the holder with the drawer of the bill, for delay, after the parties had been fixed by due notice of the dishonor of the bill. The court held that the agreement was not binding in point of law, and therefore it did not exonerate the indorser. On that occasion, the court said: "We admit the doctrine that, although the indorser has received due notice of the dishonor of the bill, yet, if the holder afterwards enters into any new agreement with the drawer for delay, in any manner changing the nature of the original contract, or affecting the rights of the indorser, or to the prejudice of the latter, it will discharge him. But, in order to produce such a result, the agreement must be one binding in law upon the parties, and have a sufficient consideration to support it," &c. "If the holder enters into a valid contract for delay, he thereby suspends his own remedy on the bill for the stipulated period; and if the indorser were to pay the bill, he could only be subrogated to the rights of the holder, and the drawer could or might have the same equities against him as against the holder himself. If, there-

**M'Donald's Heirs v. Smalley. 6 P.**

fore, such a contract be entered into without his assent, it is to his prejudice, and discharges him." The same reasoning applies with full force to the present case. If the bank could not have any remedy on the bill to recover payments, but was bound to wait until the next term of the circuit court, the defendant Hatch, as indorser, could not, by paying the bill, place himself in a better situation. He would be liable to the same equities, under the agreement suspending the remedy, as the bank. The same principles which this court adopted in the \* case of *M'Lemore v. Powell*, 12 [ \* 260 ] Wheat. 554, will be found illustrated and confirmed in an able opinion of Mr. Chancellor Kent, in *King v. Baldwin*, 2 Johns. Ch. 554, and applied to a case between principal and surety. There are other authorities to the same effect; *Gould v. Robson*, 8 East, 576; *Laxton v. Peat*, 2 Camp. 185; *Hubby v. Brown*, 16 Johns. 70; *Bayley on Bills*, 234.

There is a recent case in England which approaches very near to the circumstances of the present case. We allude to *Lee v. Levi*, 1 Carr. & Payne, 553. In that case the holder, after suit brought against the acceptor and the indorser, had taken a cognovit of the acceptor, for the amount of the bill, payable by instalments; and, at the trial of the suit against the indorser, Lord Chief Justice Abbott thought that this was a giving time which discharged the indorser, and the jury found a verdict accordingly. That case afterwards came before the whole court for revision, (6 Dowl. & Ry. 475,) and was then decided upon a mere collateral point, viz: that the defence having arisen after suit brought against the indorser, should have been taken advantage of by special plea, and could not be given in evidence under the general issue; so that the ruling of the lord chief justice was not brought directly into judgment. It was not, however, in any measure overruled.

Upon the whole, we are of opinion, upon the ground of the agreement stated in the special verdict being a virtual discharge of the indorser, that the judgment of the circuit court ought to be affirmed, with costs.

22 W. 587.

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**JAMES M'DONALD'S HEIRS, Appellants, v. FREEMAN SMALLEY, and others, Appellees.**

6 P. 261.

An entry of land made in the name of a person who was dead at the time of the entry, is a nullity in the State of Ohio.

*Vinton and Doddridge*, for the appellants.

*Corwin and Bibb*, for the appellees.

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MARSHALL, C. J., delivered the opinion of the court.

This suit was brought in the court of the United States for the seventh circuit and district of Ohio, to obtain a conveyance for land which the defendants hold by a senior patent, and which the plaintiffs claim under a prior entry. The bill was dismissed by the circuit court, and the plaintiffs have appealed to this court.

Serious doubts exist respecting the validity of the entry under which the claim has been made, and several points have been discussed at the bar. It is unnecessary to decide more than one of these questions, because that is decisive of the case. David Anderson, in whose name the entry under which the plaintiffs claim was made, was dead at the time. The entry, therefore, as was determined in *Galt and others v. Galloway*, 4 Pet. 332, 345, is, in the State of Ohio, a nullity. This being the foundation of the plaintiff's title, they must fail in their action.

Counsel at the bar have endeavored to distinguish this case from that, by treating the entry as one made in the name of the wrong person, through the mistake of the surveyor.

We do not think he is sustained by the fact or the law of the case. The decree is affirmed, with costs.

12 P. 264; 7 H. 262; 18 W. 427.

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JOHN CONARD, Marshal of the Eastern District of Pennsylvania, the United States, Plaintiffs in Error, v. THE PACIFIC INSURANCE COMPANY OF NEW YORK, Defendants.

6 P. 262.

A consignment of a homeward cargo being "to order," the plaintiffs, who were indorsees of the bills of lading, had a right to enter the goods, under the 36th and 62d sections of the Collection Act, of March 2, 1799, (1 Stats. at Large, 627.) The importer has such a right of possession as general owner, that, after he has duly offered to enter the goods and pay the duties, he may maintain an action of trespass for a wrongful taking thereof.

THE case is stated in the opinion of the court, and in the former reports of the same case.

It was submitted, without argument, by *Taney*, (attorney-general,) for the United States.

*Ogden* and *Sergeant*, contra.

[ \*279 ] \*STORY, J., delivered the opinion of the court.  
This case, upon all the leading points, presents the same

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facts and circumstances which were before this court in the cases of Conard *v.* The Atlantic Insurance Company, [ \* 280 ] 1 Pet. 386, and Conard *v.* Nicoll, 4 Pet. 291. Those cases underwent the most deliberate consideration of the court, and we are entirely satisfied with the doctrines maintained in them. The present case has been submitted without argument, and contains at large the charge of the learned judge who presided at the trial; a practice which this court has often disapproved, and deems incorrect, and for the continuation of which nothing but the peculiar circumstances of the present class of cases could furnish any just apology.

The only points to which it is now necessary to advert, are those which are not embraced in the former cases, reported in the first and fourth volumes of Peters's Reports.

At the trial, the plaintiffs offered to prove a demand of the collector, and a refusal by him after the levy was made to permit an entry and delivery of the goods at the custom-house; but the counsel for the defendant objected to such proof, and the objection was overruled by the court, and the evidence given. And we are of opinion that this evidence was properly admitted. The ground of this objection must have been that the plaintiffs were not the legal owners and consignees of the goods, and so were not entitled to make an entry of them at the custom-house, and to have a delivery of them after such entry. But to this the proper answer is given by the learned judge in his charge, in conformity to the prior decisions of this court. The plaintiffs were both owners and consignees. The consignment of the homeward cargo was to order; and the plaintiffs, in virtue of the assignment, and the indorsement and possession of the bills of lading, and the other transactions stated in the case, became consignees as well as owners of the homeward cargo; and as such were already entitled to enter the same, and to have delivery thereof upon giving bonds in conformity with the provisions of the Duty Collection Act of 1799, c. 128. The 36th and 62d sections of that act clearly confer the right; and the proviso of the 62d section in nowise restrains it in cases like the present.

Another point which appears to have been pressed by the counsel for the defendant at the trial is, that the United States had a lien upon and a possession of the goods constituting the homeward cargo, at the time of their importation, for the \* amount [ \* 281 ] of duties accruing thereon; and the plaintiffs not having an actual or constructive possession, could not maintain the present action; and Harris *v.* Dennie, 3 Pet. 292, was relied on in support of this objection to the recovery; but that case has no bearing on the point. It decided no more than that no creditor could, by any

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attachment or process, take the goods upon their importation out of the possession of the United States, until the lien of the United States for the duties accruing thereon was actually discharged, either by payment of the duties, or by giving security therefor, according to the requirements of law on the part of the importer. There is no doubt that if the importer has the general right and property in the goods, that right draws after it a constructive possession, and the master of the ship is but a bailee, maintaining that possession for his benefit. And there is no pretence to say that the property of the importer in the goods is devested by any possession subsequently taken by the United States after the arrival of the goods, for the purpose of maintaining their lien for duties. That possession is not adverse to the title of the importer; and, indeed, it may be properly deemed not so much an exclusive as a concurrent and mixed possession, for the joint benefit of the importer and of the United States. It leaves the importer's right to the immediate possession perfect, the moment the lien for the duties is discharged; and if he tenders the duties, or the proper security therefor, and the collector or other officer refuses the delivery of the goods, it is a tortious conversion of the property, for which an action of trespass or trover will lie. But this case does not even present that peculiarity; for the seizure of the goods was not under any authority to take possession in order to secure the duties, but it was made by the defendant, as marshal, to satisfy an execution against Edward Thomson, who had at the time no property or interest in the goods. The act was, therefore, the common case of an unlawful seizure and levy of one man's property to satisfy an execution against another man; and in such a case trespass is clearly a fit and appropriate remedy.

Another point was, that the agreement of the 9th of October, 1826, stated in the case, connected with the facts in evidence amounted to a release or waiver by the plaintiffs, of all demand for [ \* 282 ] \* damages arising from the acts of the officers of the United States in taking possession of and detaining the goods in question. Upon this point, it is unnecessary to say more than that the agreement itself repels any such notion of a release or waiver; and it was expressly overruled in *Conard v. Nicoll*, 4 Pet. 292.

Another point was as to the rule of damages; and here the learned judge in his charge seems to have laid down the very rule contended for by the defendant's counsel. The case not being one which called for vindictive or exemplary damages, he charged the jury, (in conformity to the decision in *Conard v. Nicoll*,) that the plaintiffs were entitled to recover such damages only as they had proved themselves entitled to on account of the actual injury sustained by the seizure

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and detention of the goods; and in ascertaining what those damages were, he directed them that the plaintiffs had a right to recover the value of the goods (teas) at the time of the levy, with interest from the expiration of the usual credit on extensive sales. And in the close of the charge, he further directed them to deduct therefrom the net amount of the sales of the teas, (they had been sold under the arrangements stipulated in the agreement of the 9th of October, 1826,) after payment of duties and charges of sale, and that the balance would be the amount to which the plaintiff would be entitled. In what manner the jury actually applied these directions in forming their verdict, does not appear; and there is no reason to suppose that they have not been applied as favorably as the circumstances of the case justified.

Upon the whole, upon a careful review of the charge, and of the points upon which the counsel of the defendant requested the direction of the court to the jury, we can perceive no error in point of law applicable to the present case, which calls for the interposition of the corrective power of this court.

The judgment of the circuit court is therefore affirmed, together with interest upon the amount, at the rate of six per centum, as additional damages and costs.

10 P. 506; 5 Wal. 74; 8 W. 116; 21 W. 389.

**DAVID ROSS, Plaintiff in Error, v. CHARLES M'LUNE, Defendant in Error.**

6 P. 283.

Questions as to the probate and registration of a deed, under the North Carolina act of 1715.

THE case is stated in the opinion of the court.

*Polk*, for the plaintiff in error.

*White*, for the defendant.

\* MARSHALL, C. J., delivered the opinion of the court. [ \* 284 ]

This was an ejectment, brought by the plaintiff in error, in the court of the United States for the seventh circuit and district of East Tennessee.

At the trial, the plaintiff gave in evidence a patent from the State of North Carolina to Stockley Donelson, which covered the land in controversy. He then offered a deed of conveyance from the said Stockley Donelson and John Hackett to David Ross, the lessor of the plaintiff, for five thousand acres, being the same land contained in the aforesaid grant, which deed of conveyance is dated the 9th

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day of September, 1793, and is witnessed by Walter King, Thomas N. Clark, and Meriwether Smith; and of which deed of conveyance a copy was annexed, and made a part of the bill of exceptions; and on the back of said deed is the following indorsement of probate and registration, namely:—

December sessions, 1793. This deed was proven in open court, and ordered to be recorded. RICHARD MITCHELL, Clerk.

This conveyance is registered 27th December, 1793, in liber G, page 127, in the register's office of Hawkins county.

THOMAS JACKSON, C. R.

State of Tennessee. At a court of pleas and quarter sessions began and held for the county of Hawkins, at the court-house in Rogersville, on the second Monday of December, 1793. Present, Thomas Henderson, Isaac Lane, James Berry, and Thomas Amey, Esquires. A deed of conveyance from Stockley Donelson and John Hackett to David Ross, proved in open court, by M. Smith, that he saw Donelson sign for himself, and signed as attorney for Haget, and ordered to be registered.

[ \*285 ] . \* State of Tennessee. I, Stockley D. Mitchell, clerk of the court of pleas and quarter sessions of Hawkins county, in the State aforesaid, do certify the foregoing to be a true copy from the records of my office. Given under my hand, at office in Rogersville, this 16th day of October, A. D. 1828. Stockley D. Mitchell, clerk of the court of pleas, &c., for Hawkins county, Tennessee.

To the reading of which deed of conveyance on the probates and registration aforesaid, the defendant objected, and the court sustained the objection, and would not permit said deed to be read. Plaintiff then offered to prove by Meriwether Smith, who was one of the subscribing witnesses to said deed, that he proved the execution of said deed, in the court of pleas and quarter sessions for Hawkins county, at December sessions of said court, in the year 1793; and plaintiff also offered to prove by Mitchell, whose name was subscribed to the probate on the back of said deed, that he, Richard Mitchell, was the clerk of the court of pleas and quarter sessions for Hawkins county in the year 1793; and that the foregoing deed was the one proved by Meriwether Smith, the subscribing witness thereto, at December term of said court, in the year 1793; but the court would not permit said proof to be given in support of the probate of said deed.

Plaintiff offered to prove further, that said deed and grant covered the land sued for, and that Anne Hackett, the defendant, was in possession at the time of the institution of this suit; but said proof was rejected by the court. The jury found a verdict for defendant.

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and lessor of the plaintiff moved for a new trial, and produced and read the affidavit of Thomas Hopkins, trustee, annexed, marked C; but the court refused a new trial.

NOTE. While the cause was before the jury, plaintiff offered to read a grant from the State of North Carolina to Stockley Donelson and John Hackett, for five thousand acres of land, dated the 22d day of February, 1795; which last-mentioned grant also covered the land in dispute; which grant the court considered as read to the jury.

The jury found a verdict for the defendant, the judgment on which is brought before this court by a writ of error.

The plaintiff contends that the instructions given by the [ \*286 ] court are erroneous, and that the deed from Donelson and Hackett to Ross ought to have been admitted.

In the year 1715, the State of North Carolina passed an act concerning the registration of deeds, the 5th section of which is in these words: "No conveyance or bill of sale for lands other than mortgages, in what manner soever drawn, shall be good and available in law, unless the same shall be acknowledged by the vendor, or proved by one or more evidences on oath, either before the chief justice or in the court of the precinct where the land lieth, and registered by the public register of the precinct where the land lieth, within twelve months after the date of the said deed; and that all deeds so drawn and executed shall be valid and pass estates in land or right to other estate, without livery of seisin, attornment, or other ceremony in the law whatsoever."

Under this act two requisites are essential to the validity of a deed: probate, and registration in the precinct or county in which the land lies. The proof which shall be sufficient to establish these requisites, is not prescribed by the act with such precision as to exclude difference of opinion respecting it. But the questions which grow out of the language of the act, so far as they have been settled by judicial decisions, cannot be disturbed by this court. Whatever might have been our opinion on the case, had it remained open for consideration, the peace of society and the security of titles require that we should conform to the construction which has been made in the courts of the State, if we can discern what that construction is.

The plaintiff contends that the deed ought to have been admitted on the certificates of probate and registration indorsed on it. First, the certificate of probate. It is in these words: "December session, 1783. This deed was proven in open court, and ordered to be recorded."

The act requires that the deed should be acknowledged by the

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vendor, or proved by one or more witnesses in the court of the county in which the land lieth.

It appears to be universally understood that the proof ought to be made by a subscribing witness to the deed; and certainly an instrument to which there are subscribing witnesses, ought to be [ \* 287 ] \* proved by some one of them, if any one be living. The fact, too, to which the witness testifies, ought to be stated on the record, that a judgment may be formed on its sufficiency. The order of the court, that it should be recorded, does not, the defendant contends, cure this defect. The court proceeds *ex parte*, in a summary manner, and the correctness of its proceedings ought to appear on the record. Its judgment is not presumed to be right as when acting in a regular course.

In *Knox v. Bowman's Lessee*, decided in the supreme court of Tennessee, at Knoxville, on exceptions taken in the inferior court, a question arose on the probate of a deed indorsed thus: "State of Tennessee, Washington county. At a court held for the county of Washington, on the first Monday of November, 1789, the within deed of conveyance from Bradley Gamble to Michael Massingile was proved in court by the oath of —— Starns. Given under my hand, at office, 27th of November, 1819. JAMES SEVIER, Clerk."

This deed was admitted. On considering the exception taken to its admission, the court observed, "the clerk should have given a copy from the minute-book verbatim, and not a history of what had taken place; because the court, and not he, must judge of the conclusions which are proper to be made from the naked fact appearing on the record-book. Had an exact copy been given, the court should have presumed, after such a lapse of time, at least until the contrary were shown, that Starns was a subscribing witness." The court added, "where enough is stated by the clerk to show that a witness was sworn, or that the deed was acknowledged by the bargainer, however informally or unscientifically the clerk may have expressed the fact, the legality of the probate or acknowledgment should be enforced, and such old probate should be presumed to have been made in the proper county until the contrary appear."

The general principles laid down by the court in the last sentence, show that every reasonable presumption will be made to support an ancient probate where the entry has been informal or unscientific; but the decision on the particular point seems applicable to the very case before the court. The clerk certifies that the deed was proved by the oath of Starns. This is undertaking to know what [ \* 288 ] in point of law is proof, \* and to certify his conclusion instead of stating the fact which the witness did prove, so as

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to enable the court to draw the inference of law from it. So in this case; instead of stating the fact to which the witness testified, the clerk certifies that the deed was proved. This, according to the decision in the case cited, is a legal inference, which the court alone could draw from the fact as certified.

In the same case, a deed was offered from Gales to the lessor of the plaintiff, indorsed thus: "February session, 1802. This deed was legally admitted to record." The court allowed this deed also to be given in evidence, and an exception was taken to its admission. In commenting on this opinion, the supreme court observed, "it is not said in what county, nor upon what ground; whether because proved by witnesses, or acknowledged by the bargainor, or for some other cause."

Both these exceptions were sustained, and the judgment of the inferior court was reversed. The ground of reversal appears to be that the certificate of probate stated the legal inference, without stating the fact from which that inference was drawn. In the one case it was stated that the deed was proved in court by the oath of Starns; in the other, that it was legally admitted to record. If legally admitted, it could not be material to inquire whether it was admitted on the acknowledgment of the vendor or the proof of witnesses. The error, therefore, must be that the conclusion to which the court came is indorsed on the deed, and not the fact which led to that conclusion. In the probate of deeds, the court has a special limited jurisdiction; and the record should state facts which show its jurisdiction in the particular case. If this rule be disregarded, every deed admitted to record, on whatever evidence, must be considered as regularly admitted.

The counsel for the plaintiff has endeavored to cure this defect in the indorsement on the deed, by a distinct entry made in Hawkins county court, at the same session of December, 1793. That entry is in these words: "At a court of pleas and quarter sessions began and held for the county of Hawkins, at the court-house in Rogersville, on the second Monday of December, 1793. Present, Thomas Henderson, Isaac Lane, James Berry, and Thomas Amey, Esquires. A deed of conveyance from Stockley Donelson and John Hackett, to David Ross, proved \* in open court by Mr. [ \* 289 ] Smith, that he saw Donelson sign for himself, and signed as attorney for Haget, and ordered to be registered."

"State of Tennessee. I, Stockley D. Mitchell, clerk of the court of pleas and quarter sessions of Hawkins county, in the State aforesaid, do certify the foregoing to be a true copy from the records of my office. Given under my hand, at office in Rogersville, this

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16th day of October, A. D. 1828. STOCKLEY D. MITCHELL, Clerk of the Court of Pleas, &c., for Hawkins county, Tennessee.

The difficulty of applying this certificate to the deed offered in evidence, is insurmountable. The deed offered in evidence purports to have been executed by Stockley Donelson and John Hackett, each for himself, and not by attorney. The probate indorsed on the deed, represents it to have been so executed. The entry certified by Stockley D. Mitchell, in 1828, shows the probate of a deed executed by Stockley Donelson for himself, and as attorney in fact for John Hackett. They cannot be presumed to be the same. Stockley Donelson and John Hackett may have conveyed more than one tract of land to David Ross, and it is not at all improbable that Meriwether Smith may have witnessed both deeds.

An attempt has been made to reconcile this incompatibility by parol testimony. Richard Mitchell, who was clerk of the court for Hawkins county in the year 1793, was offered as a witness, to prove that the deed now offered in evidence was the one proved by Meriwether Smith, the subscribing witness thereto, at December term, 1793, but the court would not permit this proof to be given in support of the deed; and to this opinion, also, an exception was taken.

This is an attempt by parol testimony to vary a record. It is an attempt to prove by the officer of the court, that his official certificate of probate, indorsed on the deed, did not conform to the true state of the proof. This is in such direct opposition to the settled rules of evidence, as to render it unnecessary to remark the danger of trusting to memory in such a case after a lapse of thirty-five years.

There are other objections to the admission of this certificate, which [ \* 290 ] would require very serious consideration, if it were necessary to decide them. It is questioned whether the \* order made on the second Monday of December, 1793, even if it related to the deed under which the plaintiff claims, could be given in evidence, as it was not indorsed on the deed or registered with it. The plaintiff's counsel has cited several acts of assembly, which are supposed to settle this point in his favor. It was fully considered in the case of *Minick's Lessee v. Hodges, Brown, and others*, decided in the supreme court of Tennessee, in July, 1831. A decision on it is unnecessary, because the court is satisfied that the order must relate to a different deed.

We are of opinion that there is no error in the opinions given by the circuit court. The judgment is affirmed, with costs.

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**ASA GREEN, Plaintiff in Error, v. THE LESSEE OF HENRY NEAL,  
Defendant in Error.**

6 P. 291.

The construction of a statute of limitations of Tennessee being well settled by a series of decisions of the highest court of that State, differently from what was understood by this court when it made a former decision, and subsequently thereto, that decision was overruled, and the rule fixed by the state court was adopted.

THE facts of the case are stated in the opinion of the court.

*Grundy*, for the plaintiff in error.

*Isaacks*, for the defendant.

\* M'LEAN, J., delivered the opinion of the court.

[ \* 292 ]

This writ of error is prosecuted to reverse a judgment of the circuit court for West Tennessee. An action of ejectment was prosecuted by Neal in that court, to recover the possession of six hundred and forty acres of land. The issue was joined, and at the trial, the defendant relied upon the statute of limitations, and prayed certain instructions of the court to the jury. Instructions were given, as stated in the following bill of exceptions.

"In the trial, the plaintiff introduced in evidence a grant from the State of North Carolina, dated , to \* Wil- [ \* 293 ] loughby Williams, for the land in controversy, and deduced a regular chain of conveyances to plaintiff's lessor, and proved defendant in possession of the land in question at the time suit was brought; defendant introduced a deed from Andrew Jackson to Edward Dillon, and proved that defendant held by a lease from Dillon; and also in support of Dillon's title, introduced evidence tending to prove that persons claiming under and for Dillon, had been more than seven years in possession of the premises in dispute, adverse to the plaintiffs; upon which the court charged the jury that, according to the present state of decision in the supreme court of the United States, they could not charge that defendant's title was made good by the statute of limitations."

The decision of the point raised by the bill of exceptions in this case, is one of great importance; both as it respects the amount of property which may be affected by it, and the principle which it involves.

In the case of *Patton's Lessee v. Easton*, 1 Wheat. 476, which was brought to this court by writ of error in 1816, the same question, which was raised by the bill of exceptions, was then decided. But

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it is contended that, under the peculiar circumstances of the case now before the court, they ought not to feel themselves bound by their former decision. This court, in the case of Powell's Lessee v. Harman, 2 Pet. 241, gave another decision, under the authority of the one just named; but the question was not argued before the court.

The question involves, in the first place, the construction of the statutes of limitations, passed in 1715 and in 1797. The former was adopted by the State of Tennessee, from North Carolina; the third section of which provides, "that no person or persons, or their heirs, which hereafter shall have any right or title to any lands, tenements, or hereditaments, shall thereunto enter or make claim, but within seven years after his, her or their right or title shall descend or accrue; and in default thereof, such person or persons so not entering or making default, shall be utterly excluded and disabled from any entry or claim thereafter to be made." The fourth section provides, after enumerating certain disabilities, and the time within which suit must

be brought, after they shall cease, that "all possessions held [ \* 294 ] without suing such claim as aforesaid, shall be a perpetual bar against all and all manner of persons whatever, that the expectation of heirs may not, in a short time, leave much land unpossessed, and titles so perplexed that no man will know from whom to take or buy land."

In the year 1797, the legislature, in order to settle the "true construction of the existing laws respecting seven years' possession," enact "that in all cases, wherever any person or persons shall have had seven years' peaceable possession of any land, by virtue of a grant or deed of conveyance founded upon a grant, and no legal claim by suit in law, by such, set up to said land, within the above term, that then, and in that case, the person or persons so holding possession as aforesaid, shall be entitled to hold possession in preference to all other claimants, such quantity of land as shall be specified in his, her, or their said grant or deed of conveyance, founded on a grant as aforesaid." This act further provides that those who neglect, for the term of seven years, to assert their claim, shall be barred.

This court, in the conclusion of their opinion in the case of Patton's Lessee v. Easton, 1 Wheat. 481, say, "this question, too, has at length been decided in the supreme court of the State. Subsequent to the division of opinion on this question in the circuit court, two cases have been decided in the supreme court for the State of Tennessee, which have settled the construction of the act of 1797. It has been decided, that a possession of seven years is a bar only

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when held 'under a grant, or a deed founded on a grant.' The deed must be connected with the grant. This court concurs in that opinion. A deed cannot be 'founded on a grant,' which gives a title not derived in law or equity from that grant; and the words, 'founded on a grant,' are too important to be discarded."

The two decided cases, to which reference is made above, are *Lillard v. Elliott*, and *Douglass v. Bledsoe's Heirs*. These cases were decided in the year 1815; and this court considered that they settled the construction of the statute of 1797. But it is now made to appear that these decisions were made under such circumstances that they were never considered, in the State of Tennessee, as fully settling the construction of the act.

In the case of *Lillard v. Elliott*, it seems but two judges concurred on the point, the court being composed of four; and, in \*the case of *Weatherhead v. Bledsoe*, 2 Overton, 352, [ \*295 ] there was great contrariety of opinion among the judges, on the point of either legal or equitable connection. The question was frequently raised before the supreme court of Tennessee; but the construction of the two statutes of limitations was never considered as finally settled until 1825, when the case of *Gray and Reeder v. Darby's Lessee, Mart. & Yerg.* 396, was decided.

In this cause, an elaborate review of the cases which had arisen under the statute is taken, and the construction of both statutes was given, that it is not necessary, to entitle an individual to the benefits of the statutes, that he should show a connected title, either legal or equitable. That if he prove an adverse possession of seven years under a deed, before suit is brought, and show that the land has been granted, he brings himself within the statutes.

Since this decision, the law has been considered as settled in Tennessee; and there has been so general an acquiescence in all the courts of the State, that the point is not now raised or discussed. This construction has become a rule of property in the State, and numerous suits involving title have been settled by it.

Had this been the settled construction of these statutes when the decision was made by this court, in the case of *Patton's Lessee v. Easton*, there can be no doubt that that opinion would have conformed to it. But the question is now raised, whether this court will adhere to its own decision, made under the circumstances stated, or yield to that of the judicial tribunals of Tennessee. This point has never before been directly decided by this court, on a question of general importance. The cases are numerous where the court have adopted the constructions given to the statute of a State by its supreme judicial tribunal; but it has never been decided that this court

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will overrule their own adjudication, establishing an important rule of property, where it has been founded on the construction of a statute made in conformity to the decisions of the State at the time, so as to conform to a different construction adopted afterwards by the State.

This is a question of grave import, and should be approached with great deliberation. It is deeply interesting in every point [ \* 296 ] of view in which it may be considered. As a rule of property it is important; and equally so, as it regards the system under which the powers of this tribunal are exercised.

It may be proper to examine in what light the decisions of the state courts, in giving a construction to their own statutes, have been considered by this court.

In the case of *M'Keen v. Delancy's Lessee*, reported in 5 Cranch, 22, this court held, that the acknowledgment of a deed before a justice of the supreme court, under a statute which required the acknowledgment to be made before a justice of the peace, having been long practised in Pennsylvania, and sanctioned by her tribunals, must be considered as within the statute.

The chief justice, in giving the opinion of the court in the case of *Bodley v. Taylor*, 5 Cranch, 221, says, in reference to the jurisdiction of a court of equity: "Had this been a case of the first impression, some contrariety of opinion would, perhaps, have existed on this point. But it has been sufficiently shown, that the practice of resorting to a court of chancery, in order to set up an equitable against the legal title, received in its origin the sanction of the court of appeals, while Kentucky remained a part of Virginia, and has been so confirmed by an uninterrupted series of decisions, as to be incorporated into their system, and to be taken into view in the consideration of every title to lands in that country. Such a principle cannot now be shaken."

In the case of *Taylor v. Brown*, 5 Cranch, 255, the court say, in reference to their decision in the case of *Bodley v. Taylor*: "This opinion is still thought perfectly correct in itself. Its application to particular cases, and indeed its being considered as a rule of decision on Kentucky titles, will depend very much on the decisions of that country. For, in questions respecting title to real estate, especially, the same rule ought certainly to prevail in both courts."

This court, in laying down the requisites of a valid entry, in the case of *Massie v. Watts*, 6 Cranch, 165, say: "These principles have been laid down by the courts, and must be considered as expositions of the statute. A great proportion of the landed property of the country depends on adhering to them."

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In 9 Cranch, 98, the court say, that "in cases depending on the statute of a State, and more especially in those [ \* 297 ] respecting titles to lands, the federal courts adopt the construction of the State, where that construction is settled and can be ascertained. And in 5 Wheat. 279, it is stated, that "the supreme court uniformly acts under a desire to conform its decisions to those of the state courts, on their local laws."

The supreme court holds in the highest respect decisions of state courts upon local laws forming rules of property. 2 Wheat. 316. In construing local statutes respecting real property, the courts of the Union are governed by the decisions of the state tribunals. 6 Wheat. 119. The court say, in the case of *Elmendorf v. Taylor et al.* 10 Wheat. 152, "that the courts of the United States, in cases depending on the laws of a particular State, will, in general, adopt the construction which the courts of the State have given to those laws." "This course is founded upon the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government."

In 7 Wheat. 361, the court again declare, that "the statute laws of the States must furnish the rule of decision to the federal courts, as far as they comport with the constitution of the United States, in all cases arising within the respective States; and a fixed and received construction of their respective statute laws, in their own courts, makes a part of such statute law." The court again say, in 12 Wheat. 153, "that this court adopts the local law of real property, as ascertained by the decisions of the state courts, whether these decisions are grounded on the construction of the statutes of the State, or form a part of the unwritten law of the State, which has become a fixed rule of property."

Quotations might be multiplied, but the above will show that this court have uniformly adopted the decisions of the state tribunals, respectively, in the construction of their statutes. That this has been done as a matter of principle, in all cases where the decision of a state court has become a rule of property.

In a great majority of the causes brought before the federal tribunals, they are called to enforce the laws of the States.

\* The rights of parties are determined under those laws, and [ \* 298 ] it would be a strange perversion of principle, if the judicial exposition of those laws, by the state tribunals, should be disregarded. These expositions constitute the law, and fix the rule of property. Rights are acquired under this rule, and it regulates all the transactions which come within its scope.

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It is admitted in the argument, that this court, in giving a construction to a local law, will be influenced by the decisions of the local tribunals; but, it is contended, that when such a construction shall be given in conformity to those decisions, it must be considered final. That if the State shall change the rule, it does not comport either with the consistency or dignity of this tribunal to adopt the change. Such a course, it is insisted, would recognize in the state courts a power to revise the decisions of this court, and fix the rule of property differently from its solemn adjudications. That the federal court, when sitting within a State, is the court of that State, being so constituted by the constitution and laws of the Union; and, as such, has an equal right with the state courts to fix the construction of the local law.

On all questions arising under the constitution and laws of the Union, this court may exercise a revising power, and its decisions are final and obligatory on all other judicial tribunals, state as well as federal. A state tribunal has a right to examine any such questions and to determine them, but its decision must conform to that of the supreme court, or the corrective power may be exercised. But the case is very different where a question arises under a local law. The decision of this question, by the highest judicial tribunal of a State, should be considered as final by this court; not because the state tribunal, in such a case, has any power to bind this court; but because, in the language of the court, in the case of *Shelby et al. v. Guy*, 11 Wheat. 361, "a fixed and received construction by a State, in its own courts, makes a part of the statute law."

The same reason which influences this court to adopt the construction given to the local law, in the first instance, is not less strong in favor of following it in the second, if the state tribunals should change the construction. A reference is here made, not to a single [ \* 299 ] adjudication, but to a series of decisions \* which shall settle the rule. Are not the injurious effects on the interests of the citizens of a State as great, in refusing to adopt the change of construction, as in refusing to adopt the first construction? A refusal in the one case as well as in the other has the effect to establish, in the State, two rules of property.

Would not a change in the construction of a law of the United States, by this tribunal, be obligatory on the state courts? The statute, as last expounded, would be the law of the Union; and why may not the same effect be given to the last exposition of a local law by the state court? The exposition forms a part of the local law, and is binding on all the people of the State, and its inferior judicial tribunals. It is emphatically the law of the State, which

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the federal court, while sitting within the State, and this court, when a case is brought before them, are called to enforce. If the rule as settled should prove inconvenient or injurious to the public interests, the legislature of the State may modify the law or repeal it.

If the construction of the highest judicial tribunal of a State form a part of its statute law, as much as an enactment by the legislature, how can this court make a distinction between them? There could be no hesitation in so modifying our decisions as to conform to any legislative alteration in a statute; and why should not the same rule apply where the judicial branch of the state government, in the exercise of its acknowledged functions, should, by construction, give a different effect to a statute, from what had at first been given to it. The charge of inconsistency might be made with more force and propriety against the federal tribunals for a disregard of this rule, than by conforming to it. They profess to be bound by the local law; and yet they reject the exposition of that law which forms a part of it. It is no answer to this objection that a different exposition was formerly given to the act which was adopted by the federal court. The inquiry is, what is the settled law of the State at the time the decision is made. This constitutes the rule of property within the State, by which the rights of litigant parties must be determined.

As the federal tribunals profess to be governed by this rule, they can never act inconsistently by enforcing it. If they change their decision, it is because the rule on which that [ \* 300 ] decision was founded has been changed.

The case under consideration illustrates the propriety and necessity of this rule. It is now the settled law of Tennessee that an adverse possession of seven years, under a deed for land that has been granted, will give a valid title. But by the decision of this court such a possession, under such evidence of right, will not give a valid title. In addition to the above requisites, this court have decided that the tenant must connect his deed with a grant. It therefore follows that the occupant whose title is protected under the statutes before a state tribunal, is unprotected by them before the federal court. The plaintiff in ejectment, after being defeated in his action before a state court, on the above construction, to insure success has only to bring an action in the federal court. This may be easily done by a change of his residence, or a *bon *fide** conveyance of the land.

Here is a judicial conflict arising from two rules of property in the same State, and the consequences are not only deeply injurious to the citizens of the State, but calculated to engender the most lasting discontents. It is therefore essential to the interests of the

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country, and to the harmony of the judicial action of the federal and state governments, that there should be but one rule of property in a State.

In several of the States, the English statute of limitations has been adopted with various modifications; but in the saving clause, the expression "beyond the seas," is retained. These words in some of the States are construed to mean "out of the State," and in others a literal construction has been given to them.

In the case of Murray's Lessee v. Baker *et al.* 3 Wheat. 541, this court decided that the expressions "beyond seas," and "out of the State," are analogous; and are to have the same construction. But, suppose the same question should be brought before this court from a State where the construction of the same words had been long settled to mean literally beyond seas, would not this court conform to it? And might not the same arguments be used in such a case, as are now urged against conforming to the local construction of the law of Tennessee. Apparent inconsistencies in the construction [ \* 301 ] of the statute laws of the States, may be expected to arise from the organization of our judicial systems; but an adherence by the federal courts to the exposition of the local law, as given by the courts of the State, will greatly tend to preserve harmony in the exercise of the judicial power, in the state and federal tribunals. This rule is not only recommended by strong considerations of propriety, growing out of our system of jurisprudence, but it is sustained by principle and authority.

As it appears to this court that the construction of the statutes of limitations is now well settled, differently from what was supposed to be the rule at the time this court decided the case of Patton's Lessee v. Easton, 1 Wheat. 476, and the case of Powell's Lessee v. Harman, 2 Pet. 241; and as the instructions of the circuit court were governed by these decisions, and not by the settled law of the State; the judgment must be reversed, and the cause remanded for further proceedings.

BALDWIN, J., dissented.

11 P. 361; 16 P. 455; 2 H. 76; 7 H. 198; 8 H. 495; 11 H. 297, 414; 14 H. 488; 2 B. 699; 1 Wal. 175; 18 W. 82; 7 O. 637; 8 O. 235, 470; 10 O. 52, 54.

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JAMES GREENLEAF'S LESSEE, Plaintiff in Error, *v.* JAMES BIRTH,  
Defendant in Error.

6 P. 302.

In a deed by which the grantor "doth grant, except as is hereinafter excepted," the exception is not out of a thing previously granted; but being incorporated into the granting

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cleanse itself, the thing excepted is not granted ; and, therefore, there is no exception of a thing certain out of a thing certain granted.  
An exception of all squares and lots conveyed, or sold, or agreed to be conveyed, prior to a day named, by three persons, or either of them, is not void for uncertainty.  
Though the burden of proof is in many cases on the party who has peculiar means of knowledge, the rule is not universal, and the circumstances of this case afford an exception.  
In Maryland, a deed not enrolled, is a nullity ; and conveyances by an insolvent to his assignee are not an exception to the general rule.

THE case is stated in the opinion of the court.

*Coxe and Jones*, for the plaintiff.

*Swann and Key*, contra.

\* STORY, J., delivered the opinion of the court.

[ \* 308 |

This is a writ of error to the circuit court of the District of Columbia. The original action was an ejectment, brought in May, 1818, by the plaintiff in error, against the defendant in error, for a certain lot of ground, number 17, square 75, in [ \* 309 ] the city of Washington, and was founded upon demises.

Upon the trial, (which was at December term, 1829,) a verdict was found for the defendant, upon which he had judgment. Two bills of exceptions were taken at the trial, on behalf of the plaintiff, and the questions for the consideration of this court grew out of the matter of those exceptions.

The first bill of exceptions states that, at the trial, a title to the premises in controversy was deduced from the State of Maryland, by inesne conveyances to James Greenleaf, the lessor of the plaintiff, in September, 1794. Whereupon the defendant, to show a title out of the plaintiff, gave in evidence to the jury a deed from Greenleaf to Robert Morris and John Nicholson, dated the 13th of May, 1796, the due execution of which was admitted, and offered no other evidence. Whereupon the plaintiff's counsel prayed the court to instruct the jury that the said deed, unaccompanied by any other evidence, did not show such an outstanding title as was sufficient to bar the plaintiff's recovery in the suit ; which instruction the court refused to give ; to which refusal the plaintiff's counsel excepted. And the question before this court is, whether this exception is well founded.

The deed of Greenleaf to Morris and Nicholson purports to grant to them in fee as tenants in common, " except as is hereinafter excepted, all those hereinafter mentioned and described lots, squares, lands, and tenements, situate in the city of Washington, in the District of Columbia, wherein the said James Greenleaf, and the said Robert Morris and John Nicholson were jointly interested, in each

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one equal undivided third part, on the day of the date of the above-named articles of agreement," (the 10th of July, 1796,) &c., &c. It then proceeds to specify three squares and lots contracted for by Greenleaf, with the commissioners of the city of Washington; and three thousand lots contracted for by Greenleaf, as agent of Morris, with the same commissioners; and about two hundred and twenty lots, contracted for by Greenleaf with Daniel Carroll; and about four hundred and twenty-eight and a half lots contracted for by Greenleaf with Notley Young; and then proceeds, "and also all those lots situate in the said city of Washington, supposed [ \* 310 ] to be about two hundred and thirty-nine and one quarter in number, for which the said James Greenleaf contracted with Uriah Forrest and Benjamin Stoddert by an agreement in writing, bearing date, &c., (15th of July, 1794.) The lot sued for was one of these lots, and was included in a conveyance made by Forrest and Stoddert to Greenleaf, on the 24th of September, 1794. Several other parcels of lots are then specified, and then comes the following exception: "excepting, nevertheless, out of the lots, squares, lands, and tenements above mentioned, all that square marked and distinguished in the plan of the said city of Washington, by the number 506, and that other square lying next to and south of the said number 506, and all that other square lying next to and south of the square last aforesaid, the said square containing, &c., &c., which it is agreed, &c., shall be and remain the sole and separate property of the said James Greenleaf, and his heirs and assigns. And excepting also all such squares, lots, lands, or tenements as were either conveyed or sold, or agreed to be conveyed, either by all or either of them, the said James Greenleaf, Robert Morris, or John Nicholson, or any of their agents or attorneys, to any person or persons whatsoever, at any time prior to the said 10th day of July, A. D. 1795.

It is observable that the granting part of the deed begins by excepting from its operation all the lots, squares, lands, and tenements which are within the exceptions. The words are, "doth grant, &c., except as is hereinafter excepted, all those hereinafter mentioned and described lots, squares, lands, and tenements," &c. In order, therefore, to ascertain what is granted, we must first ascertain what is included in the exception; for whatever is within the exception is excluded from the grant; according to the maxim laid down in Co. Litt. 47 a, *si quis rem dat et partem retinet, illa pars quam retinet semper cum eo est, et semper fuit.*

It has been argued that the second clause in the exception is utterly void for uncertainty, because it excepts "such squares, lots, &c., as were either conveyed or sold, or agreed to be conveyed,"

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without stating to whom sold or conveyed, or agreed to be conveyed, or giving any other description which would reduce them to certainty. And it has been intimated that it is also void for repugnancy, because it is an exception of a part which had been previously granted; and Co. Litt. \*47 a, has been relied on in support [ \* 311 ] of this objection; where it is laid down that an exception of a thing certain out of a thing particular and certain, will be void; as, if a man leases twenty acres, excepting one acre, the exception is void. Com. Dig. Fait, E. 7. But without stopping to inquire in what sense, and to what extent the rule thus laid down is law, it is sufficient to say that there is no such repugnancy here; for the exception is not out of the thing previously granted, but is incorporated into the very substance of the granting clause.

As to the other exception, we do not think it is void for uncertainty. It refers to things by which it may be made certain, and *id certum est, quod certum reddi potest.* No one will doubt that the exception of squares and lots actually sold and conveyed, would be sufficiently certain; for they may be made certain by reference to the deeds of conveyance. And as all contracts for the sale and conveyance of lands must be in writing, there seems the same certainty in reference to the lots contracted to be conveyed by the parties or their agents.

It has been suggested, that the generality of the exception might open a door to frauds and impositions upon third persons, by enabling the parties to bring forward spurious or concealed contracts at a future time. But to this objection it is a sufficient answer, that the present is not a case of a *bond fide* purchaser or grantee, whose title may be affected by any such fraud or concealment. The defendant, Birth, is a mere stranger to the title, and, for aught that appears, is a mere intruder. It does not lie in his mouth to contend that an exception, solemnly stipulated for by the parties, shall not be binding between them. They were content to take the conveyance upon these terms. There was certainly enough in the exception to satisfy them; and it would be a fraud in the grantees to attempt to avail themselves of the general and loose expressions of the exception, to avoid the titles of parties claiming title under Greenleaf by prior deeds or contracts of lots within the reservation. Even if the exception were void at law, a court of equity would relieve them against the claims of Morris and Nicholson, set up to their prejudice. It is not improbable that many such titles in this city are now held under the faith of this exception; and a declaration, at the instance of a mere \* intruder, that it was utterly void, might work the most [ \* 312 ] serious mischief. We see no substantial ground to support it.

But if it were otherwise, still, the other exception of the square number 506, and the other two squares next south of it, are sufficiently certain. This court cannot judicially know that one of the squares next south of square number 506 is not square number 75; and there is nothing in the record that negatives it, for the defendant offered no evidence except the naked deed.

But it is said that if the exception is not void, still, the burden of proof is upon the plaintiff to establish that the lot in controversy is within the exception; because it is peculiarly within the privity and knowledge of the plaintiff's lessor what lots were conveyed and sold, and contracted to be conveyed, and the defendant has no means of knowledge. That in many cases the burden of proof is on the party within whose peculiar knowledge and means of information the fact lies, is admitted. But the rule is far from being universal, and has many qualifications upon its application. In the present case, the plaintiff has shown, *prima facie*, a good title to recover. The defendant sets up no title in himself, but seeks to maintain his possession as a mere intruder, by setting up a title in third persons, with whom he has no privity. In such a case, it is incumbent upon the party setting up the defence, to establish the existence of such an outstanding title beyond controversy. It is not sufficient for him to show that there may possibly be such a title. If he leaves it in doubt, that is enough for the plaintiff. He has a right to stand upon his *prima facie* good title, and he is not bound to furnish any evidence to assist the defence. It is not incumbent on him, negatively, to establish the non-existence of such an outstanding title; it is the duty of the defendant to make its existence certain.

Besides, this is the case of an outstanding title set up under a deed executed in 1796, under which, in respect to the act in controversy, the grantees are not shown either to have had, or to have claimed any possession or right of possession. The present ejectment was brought in 1818, twenty-two years after the execution of that deed; and the trial had in 1829, more than thirty-three [ \* 313 ] years after its execution. Under such \*circumstances, a very strong presumption certainly arises that the lot was included within the exception; for it would be difficult in any other manner to account for such total absence of claim, or possession, by the grantees. An outstanding title could hardly be deemed a good subsisting title by common presumption, under such circumstances; whereas, if the lot was within the exception, the non-claim would be natural and fully accounted for. We are, therefore, of opinion that the circuit court erred, in refusing the instruction prayed for by the plaintiff in the first bill of exceptions.

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The second bill of exceptions, after stating that the defendant admitted that the legal title to the lot in question, under the patent from the State of Maryland, was vested in the plaintiff by the patent, and by divers mesne conveyances, on the 30th day of August, 1799, proceeds to state that, thereupon, to prove a title out of James Greenleaf, the defendant offered in evidence to the jury, the proceedings in the case of James Greenleaf, an insolvent, before the chancellor of Maryland, and the act of Maryland of 1798, c. 64, to the admission of which proceedings the plaintiff objected; but the court overruled the objection and admitted the evidence; and thereupon, on the prayer of the defendant, the court instructed the jury, that the said act of 1798, and the proceedings of insolvency, did show a legal title out of the plaintiff, and did preclude a recovery in this suit, on the first count in the plaintiff's declaration; that is to say, upon the demise of Greenleaf.

The plaintiff's counsel thereupon gave in evidence the proceedings in the case of the insolvency of Greenleaf, in the commonwealth of Pennsylvania, and the conveyances therein mentioned, not recorded in the State of Maryland; and prayed the court to instruct the jury that, under the operation of the said proceedings in Maryland and Pennsylvania, the legal title to the premises in the declaration, notwithstanding said conveyances, was not devested from Greenleaf, by any thing by the defendant so shown; which instruction the court refused to give, to which refusal, and instruction, and admission of evidence, the plaintiff excepted.

By the laws of Maryland, (with certain exceptions not necessary to be mentioned,) no conveyance is sufficient to pass any estate of inheritance or freehold in lands, or any estate above <sup>\*</sup>seven years, except the deed or conveyance be in writing, [ \*314 ] and acknowledged in the general court, or before a judge thereof, or in the county court, or before two justices of the county where the lands lie, &c., &c., and be enrolled in the records of the county, or of the general court, within six months after the date thereof; see act of 1715, c. 47; act of 1767, c. 14; act of 1783, c. 9; act of 1794, c. 57; act of 1798, c. 103. Neither the deed of assignment of Greenleaf to the trustee under the Maryland insolvency, nor the deed of assignment of Greenleaf to the trustees, under the Pennsylvania insolvency, have ever been enrolled in the general court, or in the county where the land in controversy lies. Unless, then, some exception can be found which exempts these assignments from the general law, the omission to enrol them renders them, in a legal sense, mere nullities, and incapable of passing any title to the land in controversy. There is no pretence of any exception in relation to

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the assignment under the Pennsylvania proceeding; and, therefore, that did not divest the title of Greenleaf. But in regard to the Maryland proceedings, it is said that there is, under the act of 1798, c. 64, respecting insolvents, a constructive exception. That act provides, section 5th, that upon the petitioning debtor's (and Greenleaf was in that predicament) executing and acknowledging a deed to the trustee to be appointed, as the act requires, conveying all his property, real, personal, and mixed, &c., and the trustee's certifying the same, it shall be lawful for the chancellor to order that the said debtor shall be discharged from all debts, &c. Greenleaf was accordingly discharged, having in this respect complied with the terms of the act. The 15th section of the act provides "that all proceedings under this act shall be recorded by the register, who shall be entitled to the same fees as are fixed by law for services in other cases, &c., &c." Now the argument is, that this clause operates, *pro tanto*, a repeal of the general laws, in relation to the enrolment of conveyances, so far as respects assignments by debtors under the act. But we think this is not the fair construction of the act. There is nothing in the act which requires the assignment to be recorded; nor does it necessarily constitute a part of the proceedings before the chancellor. On the contrary, the 5th section contemplates, that it shall be executed and acknowledged by the debtor in the usual manner, and the [ \* 315 ] trustee is to certify the \*same to the chancellor. If the deed is to be acknowledged in the usual manner, then it is to be enrolled in the usual manner, for no provision is made for its enrolment elsewhere; and the only judicial notice which the chancellor has of it, as connected with the proceedings before him, is by the certificate of the trustee. Nor is there any policy disclosed on the face of the act of 1798, which could justify the court in presuming that the legislature intended, in respect to deeds of insolvent debtors, that the ordinary securities of enrolment should be dispensed with. We think, then, that there was error in the circuit court in admitting the proceedings under the Maryland insolvency; and also in instructing the jury that these proceedings showed a legal title out of the plaintiff, and precluded a recovery in the suit.

For the same reasons, there was error in the refusal of the circuit court to instruct the jury according to the prayer of the plaintiff's counsel; that under the operation of the said proceedings in Pennsylvania and in Maryland, the legal title to the premises was not divested from Greenleaf by any thing shown by the defendant.

The judgment of the circuit court is therefore reversed, and the cause is to be remanded to the circuit court, with directions to award a *venire facias de novo*.

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Leland v. Wilkinson. 6 P.

MARSHALL, C. J., dissented from so much of the foregoing opinion as requires the defendant to show that the lot in the declaration mentioned, is not within that part of the exception contained in the deed from Greenleaf to Morris and Nicholson, which excepts therefrom "all such squares, lots, lands, or tenements as were either conveyed, or sold, or agreed to be conveyed, either by all or either of them, the said James Greenleaf, Robert Morris, and John Nicholson, or any of their agents or attorneys, to any person or persons whatever, at any time prior to the said 10th day of July, 1795;" because he understood it to impose on the defendant the necessity of proving a negative; and because the fact on which the exception depends, is within the knowledge of the plaintiff and not of the defendant.

• 9 P. 292; 10 H. 311.

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THOMAS LELAND and others v. DAVID WILKINSON.

6 P. 317.

Private laws of a State, and proceedings by its legislature in respect to the sale of estates of deceased persons, must be proved as facts, and not by certificates of the secretary of state, certifying generally to the fact that such laws exist, and such proceedings have been had, without giving transcripts thereof.

CERTIFICATE of division of opinion of the judges of the circuit court for the district of Rhode Island.

*Whipple* offered to read a certificate of the secretary of state of Rhode Island, to the effect that it had been usual for the legislature of Rhode Island to take cognizance of certain matters as to the estates of persons deceased, and to pass acts and resolves thereon, and also, that certain private laws had been passed; but transcripts of these proceedings were not given.

*Webster* objected, after the individual judges had expressed, briefly some opinions thereon.

\* MARSHALL, C. J., said, the evidence objected to is under- [ \*321 ] stood to be offered to prove that certain proceedings have • been had at different times in the legislature of Rhode [ \*322 ] Island, on private petitions of a similar nature with that before the court; and that there have been certain usages and proceedings in the legislature of Rhode Island, in regard to the administration and sale of the estates of deceased persons for their debts, which will establish, that it has for a long period, by usage, and rightfully.

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New Jersey v. New York. 6 P.

exercised the authority contended for by the defendant. The public laws of a State may, without question, be read in this court; and the exercise of any authority which they contain may be deduced historically from them; but private laws and special proceedings of the character spoken of are governed by a different rule. They are matters of fact, to be proved as such in the ordinary manner. This court cannot go into an inquiry as to the existence of such facts upon a writ of error, if they are not found on the record. The evidence, if not objected to, might have been heard; but since it is controverted, the matter of fact must be ascertained in the circuit court.

BALDWIN, J., dissented.

[Upon this decision, the parties consented to remand the cause to the circuit court for further inquiry into the facts.]

20 H. 427; 16 W. 619.

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THE STATE OF NEW JERSEY v. THE PEOPLE OF THE STATE OF NEW YORK.

6 P. 328.

An order that a party "appear and answer," before a day certain, is complied with by filing a demurrer.

UNDER the order, heretofore made in this cause, 5 P. 291, that the State of New York have leave to appear and answer on the second day of this term, the attorney-general of the State had filed a demurrer.

*Frelinghuysen*, for the complainants, moved to have the demurrer taken from the files.

*Beardsley*, contra.

MARSHALL, C. J., delivered the opinion of the court.

[ \*327 ] \* The court have had the return made in this case under consideration. It considers the demurrer filed in this case by the attorney-general of New York, as being an appearance for the State, he being a practitioner in this court; and therefore, that the demurrer is regularly filed. If the attorney-general did not so mean it, it is not a paper which can be considered as in the cause, or be placed on the files of the court. We say this now, that the attorney-general may have due notice, if he did not intend to enter any appearance for the State; it being otherwise a paper not to be received.

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Boardman v. The Lessees of Reed and Ford. 6 P.

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The demurrer, then, being admitted as containing an appearance by the State, the court is of opinion that it amounts to a compliance with the order at the last term. In that order, the word "answer," is not used in a technical sense, as an answer to the charges in the bill under oath; but an answer, in a more general sense, to the bill. A demurrer is an answer in law to the bill, though not in a technical sense an answer according to the common language of practice.

The court, therefore, direct the demurrer to be set down for argument, on the first Monday of March, of this term, according to the motion of the plaintiffs.

12 P. 657.

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DANIEL BOARDMAN and others, Plaintiffs in Error, v. THE LESSEES OF REED AND FORD; M'CALL and others, Defendants in Error.

6 P. 328.

Ancient boundaries and landmarks may be proved by reputation.

It is not error to exclude legal evidence of an isolated fact from which a jury would not be warranted in drawing any inference pertinent to the issue.

A court is not bound to give an instruction concerning a hypothetical state of facts, as to which there is no evidence before the jury.

A patent is a complete appropriation of the land it describes; and at law, no defect in the preliminary steps can be tried. *Stringer's Lessee v. Young*, 3 Pet. 320, confirmed.

The entire description in a patent must be reasonably construed, to ascertain the identity of the land. If a call is erroneous and repugnant, and enough remains, after rejecting it, to identify the land, the patent is not void.

THE case is stated in the opinion of the court.

*Maxwell*, for the plaintiffs.

*Doddridge*, contra.

\* M'LEAN, J., delivered the opinion of the court

[ \*340 ]

An action of ejectment was brought by M'Call and others against Boardman and others, in the district court of the United States for the western district of Virginia, to recover eight thousand acres of land. On the trial, certain exceptions were taken to points adjudged by the court in behalf of the plaintiffs, and against the defendants; and these points are now brought before this court by writ of error.

The first exception taken by the plaintiffs in error, is found in the following statement in the bill of exceptions: "For the purpose of showing that one of said marked trees was not a corner of one of said tracts; that is to say, was not the corner represented on the said

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draft by the letter A as a corner of John Young's 4,000 acres, the defendants' counsel offered to introduce a witness to prove that on the trial of a former action of ejectment, brought by the present lessors of the plaintiffs, against some of the defendants in the present action, to recover the land now in controversy, a witness examined on that trial, who is since dead, swore that an anciently marked corner tree was found by him at said point A, of a different [ \*341 ] kind of timber from that called for in Young's patent; \* but the evidence, as offered, was rejected by the court as inadmissible."

No part of the survey of Young is involved in the present controversy; and with several other surveys, it was only laid down by the surveyor, as by showing certain connections, it might conduce to identify the land claimed by the plaintiffs.

As the testimony of the witness referred to was not given between the same parties, his statement, if admissible, could only be received as hearsay.

That boundaries may be proved by hearsay testimony, is a rule well settled; and the necessity or propriety of which is not now questioned. Some difference of opinion may exist as to the application of this rule, but there can be none as to its legal force.

Landmarks are frequently formed of perishable materials, which pass away with the generation in which they were made. By the improvement of the country, and from other causes, they are often destroyed. It is therefore important, in many cases, that hearsay or reputation should be received to establish ancient boundaries; but such testimony must be pertinent, and material to the issue between the parties. If it have no relation to the subject, or if it refer to a fact which is immaterial to the point of inquiry, it ought not to be admitted.

In the present case, the plaintiffs supposed that, by exhibiting the plat of Young's survey in connection with others, it might tend, in some degree, to identify the land claimed by them; and the corner designated on the plat by the letter A is one of the corners of Young's survey. The official return of the surveyor, in which the corner trees were specified and the lines with which the corner is connected were laid down, being before the jury, was relied on by the plaintiffs to establish this as the corner called for in Young's survey.

The hearsay testimony was offered, not to contradict any fact stated in the return of the surveyor, but to prove that on a certain occasion, a person in his lifetime, but deceased at the trial, had said that he found an anciently marked corner tree, at the point A, of a different kind of timber from that called for in Young's patent. This

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individual did not say that he was acquainted with the lines claimed as Young's survey, nor that this was his corner.

\* If the fact as to this tree had been admitted, what effect [ \* 342 ] could it have had in the cause? It did not disprove a single fact relied on to establish the corner. How near this tree stood to the trees found by the surveyor, does not appear. It may have been marked as pointing to the corner, as is often done by surveyors; or it may have been a corner to an adjoining or conflicting survey. The existence of this marked tree may be accounted for in various ways; and its existence is in no respect, so far as appears from the bill of exceptions, incompatible with the facts proved by the plaintiffs. How then can the fact be considered as material. It sheds no light on the matter in controversy. Disconnected as the mere fact of a marked tree not called for in Young's patent at the point A seems to have been with the testimony in the cause, it is not perceived how it could have tended to influence the verdict of the jury. From the isolated fact, the jury could have drawn no inferences against the facts proved by the plaintiffs. There was, therefore, no error in the rejection of the evidence offered.

The court instructed the jury that "the grant to the plaintiffs, which was given in evidence, was a complete appropriation of the land, therein described, and vested in the patentee the title; and that any defects in the preliminary steps by which it was acquired were cured by the grant."

There can be no doubt of the correctness of this instruction. This court have repeatedly decided, that at law, no facts behind the patent can be investigated. A court of law has concurrent jurisdiction with a court of equity in matters of fraud; but the defects in an entry or survey cannot be taken advantage of at law. The patent appropriates the land, and gives the legal title to the patentee. The district court said nothing more than this; and it was justified in giving the instruction by the uniform decisions of this court.

Titles acquired under sales for taxes, depend upon different principles; and these are the titles to which some of the authorities cited in the argument refer. Where an individual claims land under a tax sale, he must show that the substantial requisites of the law have been observed; but this is never necessary when the claim rests on a patent from the commonwealth. The preliminary steps may be investigated in chancery, where \*an elder equitable [ \* 343 ] right is asserted; but this cannot be done at law.

At the request of the plaintiffs, the court also instructed the jury "that a grant is a title from its date, and conclusive against all claimants whose rights are not derived under a previous grant to that

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of the lessors of the plaintiffs;" "and that it does not affect the validity of said grant, if it appears that the entry, on which the survey upon which the grant purports to have been issued, contained other or different land from that actually surveyed." This instruction involves the same principle as the one which precedes it. If the grant appropriate the land, it is only necessary for the person who claims under it to identify the land called for.

Whether the entry was made in legal form, or the survey was executed agreeably to the calls of the entry, is not a matter which can be examined at law. Had the defendants relied on the statute of limitations, this instruction would have been erroneous; but no such defence was set up by them.

The defendants' counsel requested the court to give the following instructions:—

1. "The name of the county being mentioned in the aforesaid patent, as that in which the land thereby granted was situated, the plaintiffs are not at liberty to prove by parol that the land lies in a different county."

2. "As the said patent states the land granted to lie in the county of Monongalia, the patentees, and those deriving title from them, can only recover land in that county; and cannot, by force of the other terms of description used in the patent, recover land in the county of Harrison, at the date of the patent."

3. "It appearing from said plat and certificate of survey, upon which the patent is founded, that the survey was made in the county of Monongalia, and it appearing from the evidence introduced on the part of the plaintiffs to identify the land, that it did lie, at the time of the survey, in the county of Harrison; the patent is void, because the survey was made without authority."

4. "If various marked lines are found corresponding with [ \* 344 ] the same call of the patent, the mere coincidence of any \*one of those marked lines with the call of the patent, does not establish that line, as a line called for in the patent."

The points raised by these instructions, having been substantially decided by this court in the case of *Stringer's Lessee v. Young*, 3 Peters, 320, they are abandoned by the counsel for the plaintiffs in error. In that case, these questions were fully investigated, and they need not be again examined.

The following instructions were also requested of the court by the defendants' counsel, and refused.

5. "If there are no calls in the patent justifying the location of the land granted, as contended for by the plaintiffs, they cannot succeed in establishing their claim, by relying on extrinsic evidence."

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This instruction was refused, and this court think rightfully. It asked the court below to presume against the facts in the case, and to found an instruction upon the presumption thus raised. The calls of the patent, and the official survey and report of the surveyor were before the jury. By these, it appears that corner trees were called for, and the land was stated to lie near a large branch of French Creek, and to adjoin lands of George Jackson on the south. The course and distance from corner to corner were also laid down on the plat, and the trees called for as corners. Was the district court, then, bound, in opposition to these facts, to instruct the jury, hypothetically, that "if there were no calls in the said patent, justifying the location of the land granted," &c. There were such calls in the patent, and it was in evidence before the jury; any instruction, therefore, hypothecated on the absence of such calls, could only tend to confuse or mislead the jury, and the court committed no error in refusing it.

Where, from the evidence, the existence of certain facts may be doubtful, either from want of certainty in the proof, or by reason of conflicting evidence, a court may be called to give instructions, in reference to a supposed state of facts. But this a court is never bound to do, where the facts are clear and uncontradicted.

6. "Proof that the land claimed in this action was surveyed for the patentees, by evidence contradicting the calls of the patent, does not establish the right of the patentees, and of those claiming under them."

\* This instruction, taken as an abstract proposition, may [ \* 345 ] be true; and yet the court did not err in refusing to give it.

The contradiction supposed was in the admission of proof that the land covered by the patent is in the county of Harrison, when the patent calls for it to lie in the county of Monongalia.

That certain calls in a patent may be explained or controlled by other calls was settled, and in reference to this very point, by this court, in the case of *Stringer's Lessee v. Young*, before referred to. If the point had not been so adjudged, it would be too clear, on general principles, to admit of serious doubt.

The entire description in the patent must be taken, and the identity of the land ascertained, by a reasonable construction of the language used. If there be a repugnant call, which by the other calls in the patent clearly appears to have been made through mistake, that does not make void the patent. But if the land granted be so inaccurately described as to render its identity wholly uncertain, it is admitted that the grant is void. This, however, was not the case of the patent under consideration. Its calls are specific, and, taking them all to-

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gether, no doubt can exist as to the land appropriated by it. The call for the county may be explained, either by showing that it was made through mistake, or that, under the circumstances which existed at the time of the survey, it was not inconsistent with the other calls of the patent.

This would not be going behind the patent to establish it, for its calls fully identify the land granted; but to explain an ambiguity or doubt which arises from a certain call in the patent. This principle applies, under some circumstances, to the construction of all written instruments. The meaning of the parties must be ascertained by the tenor of the writing, and not by looking at a part of it; and if a latent ambiguity arise from the language used, it may be explained by parol.

7. "An entry in a county which is afterwards divided, does not, after the division, authorize a survey in the original county, if the land falls in the new county."

If this instruction laid down the law correctly, yet it does not show that the plaintiffs below had no legal right to recover. The point raised by it is behind the patent; and that, as before stated, cannot

[ \* 346 ] \* be investigated in an action of ejectment. To entitle the plaintiffs to a recovery in the action of ejectment, they had nothing to do but to identify the land called for in their patent. This being done, it is not competent for the defendants, by way of invalidating the plaintiffs' legal right, to show irregularity in the entry or survey on which the patent was issued. In the case of Stringer's Lessee v. Young, the entry and survey were made as stated in this instruction, and yet this court sustained the patent.

The court below, it seems, did instruct the jury that "if a land warrant be entered in the office of the surveyor of a particular county, and, before the same be surveyed, the territory in which the land located lies shall be erected into a new county, and the survey and grant afterwards effected describe the lands to be situated in the former county, the grant is not void; and the plaintiffs may show by parol evidence, extrinsic of the grant, and not inconsistent with its other descriptive calls, that the land lies within the new county."

This instruction is sustained substantially in the principles laid down by this court, in the case above cited. There are, indeed, very few points raised in this cause, which were not decided in the case of Stringer's Lessee v. Young. The questions in that cause arose under Young's patent, which was issued under precisely the same circumstances as the one under which the plaintiffs claim.

But if this point had not been settled in the case referred to, all doubt would be removed by a reference to an act of the Virginia

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legislature, passed in 1785, entitled an "act concerning the location of certain warrants upon waste and unappropriated lands in the counties of Greenbriar, Harrison, and Monongalia."

In this act it is provided, by the third section, "that all surveys heretofore made in either of the aforesaid counties, by virtue of the first location, shall be good and valid, any act to the contrary notwithstanding."

In the bill of exceptions, it is stated that evidence was relied on by the defendants, to "prove that the various marked lines, represented by the draft and report of the surveyor, and claimed by the plaintiffs to be lines of the land in controversy, and of various other tracts designated on the draft, were not actually run or marked as lines of the land in controversy, and \* of the other tracts [ \* 347 ] laid down, but had been run and marked by Henry Fink, a deputy surveyor of Monongalia, who then resided in the county of Harrison, with the view of laying off the greater part of the country represented on the plat into surveys of about one thousand acres each; and that he was employed and paid for that purpose by the persons for whom the said plats and certificates of survey were afterwards made; that after the said lines had been so marked and seen, the said plats and certificates were made out by protraction; not by the said Henry Fink, but by some other person or persons not authorized by law; that said plats and certificates of survey were never recorded in the surveyor's office of Monongalia county, nor there filed; but were surreptitiously returned to the register's office and patents obtained thereon."

It does not appear from the bill of exceptions that any evidence was offered by the defendants which was rejected by the court, to sustain this allegation of fraud. Nor does it appear that any specific instructions were asked of the court on any evidence before the jury, conduced to prove the facts here alleged. The statement can only be understood to refer to the course of argument which the defendants' counsel in the court below deemed it their duty to pursue before the jury, and which forms no part of the case now before the court. Other parts of the bill of exceptions contain a statement of various grounds taken in the defence below, but as no instructions to the jury were requested on the points thus made, they form no ground for a revision of the proceedings by a writ of error.

On a careful consideration of the points made in the bill of exceptions, this court are of opinion that there is no error in the judgment of the court below, and that the judgment must, therefore, be affirmed, with costs.

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Scott v. Lunt's Administrator. 6 P.

HUGH BOYLE, Plaintiff in Error, v. ZACHARIE and TURNER, Defendants in Error.

6 P. 348.

The opinion delivered by Mr. Justice Johnson, in Ogden v. Saunders, contains the settled law of the court.

ERROR to the circuit court of the district of Maryland.

In answer to an inquiry by Mr. Wirt,

MARSHALL, C. J., said: The judges who were in the minority of the court upon the general question as to the constitutionality of state insolvent laws, concurred in the opinion of Mr. Justice Johnson in the case of Ogden v. Saunders, 12 Wheat. 213. That opinion is therefore to be deemed the opinion of the other judges who assented to that judgment. Whatever principles are established in that opinion are to be considered no longer open for controversy, but the settled law of the court.

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RICHARD M. SCOTT, Plaintiff in Error, v. EZRA LUNT's Administrator, Defendant in Error.

6 P. 349.

The *ad damnum* in the writ being \$1,000, and the claim in the declaration \$1,241, on a writ of error by the plaintiff below, the *ad damnum* fixed the amount in dispute, and the court cannot take notice that by data in the declaration a computation may be made which would show less than \$1,000 to be due.

ERROR to the circuit court for the District of Columbia.

The action was covenant for a yearly rent charge of \$73, from August 8, 1812, to August 8, 1824. The declaration averred the amount due to be \$1,241, and the *ad damnum* was laid at \$1,000. The judgment was for the defendant.

Jones, moved to dismiss the writ of error because the record showed the matter in dispute to be less than \$1,000.

Swann, contra.

[ \*351 ] \* MARSHALL, C. J., delivered the opinion of the court.

Upon an inspection of the record, it appears that the plaintiff claims in his declaration the sum of \$1,241 as remaining due to him, and he has laid the *ad damnum* at \$1,000. Under such circumstances, a general verdict having been given against him, the matter in dispute is, in our opinion, the sum which he claims in the *ad damnum*. The court cannot judicially take notice that by compu-

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tation it may possibly be made out as matter of inference from the declaration, that the plaintiff's claim, in reality, must be less than \$1,000; much less can it take such notice in a case where the plaintiff might be allowed interest on his claim by the jury, so as to swell his claim beyond \$1,000. The motion to dismiss for want of jurisdiction is overruled.

17 H. 19.

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THE UNITED STATES v. THOMAS S. REYBURN.

6 P. 352.

On trial of an indictment for violating the act of April 20, 1818, (3 Stat. at Large, 447,) by issuing a commission to cruise against a foreign prince at peace with the United States, secondary evidence of the existence and contents of the commission is admissible, according to the usual rules of evidence.

Evidence having been given that the commission was on board of the vessel engaged in a cruise, and in the possession of J. C. her commander,—against whom several bench warrants having been issued, returns of *non est* were made—*Held*, that secondary evidence was thus rendered competent.

It was not necessary to apply to the foreign government for a copy of the commission.

THE case is stated in the opinion of the court.

Taney, (attorney-general,) and Williams, (district attorney for Maryland,) for the United States.

M'Mahon and Glenn, contra.

THOMPSON, J., delivered the opinion of the court. [ \* 363 ]

This case comes up from the circuit court for the district of Maryland, on a certificate of division of opinion, touching the admission of testimony offered on the part of the United States in support of the prosecution.

The indictment against the prisoner contains several counts.

The first charges him with having, on the 1st day of July, 1828, at the district of Maryland, within the territory and jurisdiction of the United States, issued a commission for a certain vessel called The Jane, otherwise The Congresso, to the intent that such vessel might be employed in the service of a foreign people, that is to say, in the service of the United Provinces of Rio de la Plata, to cruise and commit hostilities against the subjects and property of a foreign prince, that is to say, his imperial majesty the constitutional emperor and perpetual defender of Brazil, with whom the United States were at peace, against the form of the act of congress in such case made and provided.

The second count charges him with having delivered a commission for The Jane with the like intent. The third charges him with having delivered a commission to one John Chase for The Jane.

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[ \* 364 ] for the like purpose and with the like intent. \* The fourth charges him with having issued a commission to John Chase for The Jane, for the like purpose and with the like intent. There are some other counts, laying the offence in different ways, which are unimportant for the present question.

In support of the prosecution, it was proved that the privateer referred to in the indictment was built and fitted out in the port of Baltimore, for a certain John Chase. That The Jane sailed from the port of Baltimore for the West Indies, and at St Eustatia she hoisted Buenos Ayrean colors, changed her name to that of The Congresso, and performed a cruise under the command of John Chase, exercising therein acts of hostility against the subjects and government of Brazil.

It was also given in evidence on the part of the United States, that the said Chase stood indicted in that court for a misdemeanor for accepting, in the district of Maryland, a commission to cruise, and with cruising with the said privateer against the subjects and government of Brazil. That a bench warrant had been repeatedly issued out against the said Chase, but that he could not be found, and the process was always returned *non est inventus*. Whereupon the counsel for the United States proceeded to inquire of a competent witness, whether he saw a commission on board the said privateer. But the traverser, by his counsel, objected to the admissibility of any evidence relative to the character or contents of the said commission, because the commission was not produced by the United States, or obtained from any witness, nor a copy procured from the public archives of Buenos Ayres, nor its destruction proved, nor any efforts to procure it shown by the United States.

Upon the admissibility of the said evidence the judges were opposed in opinion, and the question comes here for decision.

The objections to the admissibility of the evidence have been submitted to the court under the following heads :—

1. Because the evidence so offered was of a secondary character.
2. Because the facts proved did not present a proper case for the admission of secondary evidence.
3. Because the evidence offered was not the next best evidence of which the nature of the case admitted.

[ \* 365 ] \* It is undoubtedly true that the evidence offered was of a secondary character. The primary evidence would have been the commission itself. The word commission, *ex vi termini*, imports a written authority; and the offence under this part of the act of congress,<sup>1</sup> (6 vol. Laws U. S. 321, § 3,) consists in issuing or

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<sup>1</sup> 3 Stats. at Large, 448.

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delivering a commission for any ship or vessel with intent that she may be employed, &c.; and there is no doubt it must be shown to have been a commission emanating from the government of the United Provinces of Rio de la Plata, as alleged in the indictment, and it must at least purport to be a valid, subsisting commission, and intended as the authority under which the vessel was to cruise. But all these inquiries relate to the sufficiency of the evidence to establish these facts, not to its competency. The former belongs to the jury to decide; the latter to the court. Whether it could have been shown that the commission about which the inquiry was made was a document coming with the indictment, and necessary to be proved in order to establish the offence, does not come within the question sent up to this court. The argument, however, against the admissibility of the evidence, goes the length of contending that nothing short of the commission itself will furnish the necessary evidence.

We think the objection in this respect not well founded; but that the case falls within the rule that, when the non-production of the written instrument is satisfactorily accounted for, secondary evidence of its existence and contents may be shown. This is a general rule of evidence applicable to criminal as well as civil suits. And there can be no reason why it should not apply to cases like the present. And indeed, a contrary rule not only might, but probably would, render the law entirely nugatory, for the offender would only have to destroy the commission, and his escape from punishment would be certain.

Under this head of the objection, it has been argued, that the commission should have been set out or recited in the indictment, or the reason for the omission should appear on the face of the indictment. If there is any ground whatever for this objection, (which we are far from intimating,) the point cannot be made here under the question sent up from the circuit court. If well founded, it must be presented in some \* other form. We are now confined to [ \* 366 ] the question on which the opinions of the judges were opposed, and the sufficiency of the indictment forms no part of that question. The objection went to the admissibility of any evidence relative to the character or contents of the commission; because it was not produced, or its non-production sufficiently accounted for; and this brings us to the second head of inquiry, namely, whether the acts proved presented a proper case for the admission of secondary evidence.

The facts which had been proved were that the privateer was built and fitted out in the port of Baltimore, for John Chase. The crew was shipped at Baltimore, by Franklin Chase, the brother of John

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Chase. That she sailed from the port of Baltimore for the West Indies under the name of The Jane, and at St. Eustatia she hoisted Buenos Ayrean colors, and changed her name to that of The Congresso, and performed a cruise under the command of the said John Chase, exercising therein acts of hostility against the subjects and government of Brazil. That Chase stood indicted in the same court for a misdemeanor for accepting a commission, and cruising with the said privateer against the government and subjects of Brazil; and that a bench warrant had been repeatedly issued against him, but he could not be found.

This evidence established very clearly that this vessel was fitted out and cruising in violation of the law of the United States, and that she was under the command of John Chase. It is reasonable, therefore, to presume that the commission on board the privateer was the authority under which Chase acted. He was the person most interested in retaining the possession of the commission; and the law will presume it to be in his custody when there is no proof to the contrary; and to him, therefore, application should be made for it. The law points to him as the depository of this document, and search for it in any other place would not amount to that due diligence to procure the primary evidence which would be necessary in order to let in the secondary evidence.

But if all reasonable diligence has been used to find it at the place where the law presumes it to be, no more can be required for the purpose of letting in the secondary evidence.

Has that been done? The person whom the law charges [ \* 367 ] with \*the custody of the paper, stands indicted for an offence against the same law; process has been repeatedly issued against him to have him apprehended, without effect. This was all the effort to find him that could reasonably be required. A subpœna to compel his attendance as a witness would have availed nothing, and the law does not require the performance of an act perfectly nugatory. But suppose Chase had been within the reach of a subpœna, and had actually attended the court, he could not have been compelled to produce the commission, and thereby furnish evidence against himself. All the means, therefore, that could have been used to produce the commission itself were exhausted.

But it has, in the third place been argued, that admitting enough had been shown to lay the foundation for the admission of secondary evidence, that which was offered was not the best evidence of which the nature of the case admitted.

The rule of evidence does not require the strongest possible evidence of the matter in dispute, but only that no evidence shall be

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given which, from the nature of the transaction, supposes there is better evidence of the fact attainable by the party. It is said in the books, that the ground of the rule is a suspicion of fraud, and if there is better evidence of the fact which is withheld, a presumption arises that the party has some secret or sinister motive in not producing it. Rules of evidence are adopted for practical purposes in the administration of justice; and must be so applied as to promote the ends for which they are designed. It has been said that, according to this rule, recourse should have been had to the records of the Buenos Ayrean government for a copy of the commission. If it should be admitted that a record is there to be found of this instrument, and that on application a copy of it might have been procured, it would be carrying the rule to pretty extravagant lengths to require the application to be made. But there is nothing in this case showing that any such record exists. Nor can this court presume, as matter of law, that a record of such commission as filled up would be found there. And, indeed, from the nature of the transaction, the contrary is the reasonable presumption. It is not unlikely that the Buenos Ayrean government may have some record of the names of persons to whom commissions had been issued. But

\* the course of the transaction almost necessarily implies, [ \*368 ] that the commissions issued here were sent out in blank, as to the names of persons and vessels, and the mere formal parts of the commissions would have furnished no evidence whatever. So that there is no reasonable ground to conclude that a record of this commission existed, from which a copy might have been made. But if that should be admitted, it does not bring the case within the rule. The evidence must be attainable, or within the power of the party who is called upon to produce it; and from the nature of this transaction, there is no reason to conclude that such was the case here; but the contrary is fairly to be inferred. It must have been a voluntary act on the part of the foreign government to have permitted a copy to be taken; and it is unreasonable to suppose that such permission would have been given. It would have been voluntarily furnishing evidence against its own agents, employed to violate our laws; and no comity of nations could have required this.

We are accordingly of opinion that the evidence offered was admissible, and direct it to be so certified to the circuit court.

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*Hughes v. The Trustees of Clarksville.* 6 P.**JAMES HUGHES, Plaintiff in Error, v. THE TRUSTEES OF THE TOWN OF CLARKSVILLE, Defendants in Error.**

6 P. 369.

Construction of certain acts of assembly of Virginia concerning lands northwest of the Ohio River, namely; the act of 1783, ceding the lands to the United States; another act of 1783, for surveying and apportioning the lands granted to the Illinois regiment, and an act of 1790, in amendment thereof; an act of 1790, for surveying and locating lands granted to George Rogers Clark and others.

A tenant is estopped to deny his landlord's title, but if the plaintiff in ejectment himself deny the validity or operation of his contract, he cannot use it to create a tenancy, and thus estop the defendant.

**THE case is stated in the opinion of the court.**

*Coxe and Bibb*, for the plaintiff in error.

*Howk*, contra.

\* **MARSHALL, C. J.**, delivered the opinion of the court.

This is a writ of ejectment originally brought by Joseph Bartholomew and others, trustees of the town of Clarksville, in the circuit court for the county of Clark in the State of Indiana, and removed on the petition of the original defendant into the court of the United States for that district.

The parties agreed on a case in the following words:—

“John Doe *ex dem.* Joseph Bartholomew, &c. Trustees of the Town of Clarksville *v.* James Hughes.

“The lessors of the plaintiff derive their title to the lands [ \*370 ] in \*the declaration mentioned, from the State of Virginia, by virtue of an act of the general assembly of said State of Virginia, passed in the year 1783, and entitled “an act for surveying and apportioning the lands granted to the Illinois regiment, and establishing a town within the said grant;” and also of another act of the general assembly of the State of Virginia, passed in the year 1790, entitled “an act to amend an act entitled an act for surveying and apportioning the lands granted to the Illinois regiment, and establishing a town within the said grant;” which said acts are in the words and figures following, to wit:—

“An act for the locating and surveying the one hundred and fifty thousand acres of land granted by a resolution of assembly, to Col. George Rogers Clark, and the officers and soldiers who assisted in the reduction of the British post in the Illinois. Be it enacted by the general assembly, that William Fleming, John Edwards, John Campbell, Walker Daniel, gentlemen, and George Rogers Clark, John Montgomery, Abraham Chaplain, John Bailey, Robert Todd,

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and William Clark, officers in the Illinois regiment, shall be and they are hereby constituted a board of commissioners, and that they, or a major part of them, shall settle and determine the claims to land under the said resolution. That the respective claimants shall give in their claims to the said commissioners, on or before the 1st day of April, 1784, and if approved and allowed, shall pay down to the commissioners, one dollar for every hundred acres of land, such claim to enable them to survey and apportion the said lands. The said commissioners shall appoint a principal surveyor, who shall have power to appoint his deputies, to be approved by the said commissioners, and to contract with him for his fees. That from and after the 1st day of April, 1784, the said commissioners, or a major part of them, shall proceed with the surveyor, to lay off the said hundred and fifty thousand acres of land on the northwest side of the Ohio River, the length of which shall not exceed double the breadth; and after laying out 1,000 acres, at the most convenient place therein for a town, shall proceed to lay out and survey the residue, and divide the same by fair and equal lots among the claimants; but no lot or survey shall exceed 500 acres. That the said commissioners, in their apportionments <sup>\*</sup>of the said [ \* 371 ] land, shall govern themselves by the allowances made by law to the officers and soldiers in the continental army. That the said commissioners shall, as soon as may be, after the said 149,000 acres shall be surveyed, cause a plat thereof, certified on oath, to be returned to the register's office, and thereupon a patent shall issue to the said commissioners, or the survivors of them, who shall hold the same in trust for the respective claimants, and they or a major part of them, shall thereafter, upon application, execute good and sufficient deeds for conveying the several portions of land to the said officers and soldiers.

"And be it further enacted, that a plat of the said 1,000 acres of land laid off for a town, shall be returned by the surveyor to the court of the county of Jefferson, to be by the clerk thereof recorded, and thereupon the same shall be and is hereby vested in William Fleming, John Edwards, Walker Daniel, John Campbell, George Rogers Clark, John Montgomery, Abraham Chaplain, John Bailey, Robert Todd, and William Clark, gentlemen, trustees, to be by them or any five of them laid off into lots of half an acre each, with convenient streets and public lots, which shall be and the same is hereby established a town, by the name of Clarksville. That after the said land shall be laid off into lots and streets, the said trustees, or any five of them shall proceed to sell the same, or so many as they shall judge expedient, at public auction, for the best price that can

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**JAMES HUGHES, Plaintiff in Error, v. THE TRUSTEES OF THE TOWN OF CLARKSVILLE, Defendants in Error.**

6 P. 369.

Construction of certain acts of assembly of Virginia concerning lands northwest of the Ohio River, namely; the act of 1783, ceding the lands to the United States; another act of 1783, for surveying and apportioning the lands granted to the Illinois regiment, and an act of 1790, in amendment thereof; an act of 1790, for surveying and locating lands granted to George Rogers Clark and others.

A tenant is estopped to deny his landlord's title, but if the plaintiff in ejectment himself deny the validity or operation of his contract, he cannot use it to create a tenancy, and thus estop the defendant.

**The case is stated in the opinion of the court.**

*Coxe* and *Bibb*, for the plaintiff in error.

*Hawk*, contra.

\* **MARSHALL, C. J.**, delivered the opinion of the court.

This is a writ of ejectment originally brought by Joseph Bartholomew and others, trustees of the town of Clarksville, in the circuit court for the county of Clark in the State of Indiana, and removed on the petition of the original defendant into the court of the United States for that district.

The parties agreed on a case in the following words: —

"John Doe *ex dem.* Joseph Bartholomew, &c. Trustees of the Town of Clarksville *v.* James Hughes.

"The lessors of the plaintiff derive their title to the lands [ \*370 ] in \*the declaration mentioned, from the State of Virginia, by virtue of an act of the general assembly of said State of Virginia, passed in the year 1783, and entitled "an act for surveying and apportioning the lands granted to the Illinois regiment, and establishing a town within the said grant;" and also of another act of the general assembly of the State of Virginia, passed in the year 1790, entitled "an act to amend an act entitled an act for surveying and apportioning the lands granted to the Illinois regiment, and establishing a town within the said grant;" which said acts are in the words and figures following, to wit: —

"An act for the locating and surveying the one hundred and fifty thousand acres of land granted by a resolution of assembly, to Col. George Rogers Clark, and the officers and soldiers who assisted in the reduction of the British post in the Illinois. Be it enacted by the general assembly, that William Fleming, John Edwards, John Campbell, Walker Daniel, gentlemen, and George Rogers Clark, John Montgomery, Abraham Chaplain, John Bailey, Robert Todd,

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and William Clark, officers in the Illinois regiment, shall be and they are hereby constituted a board of commissioners, and that they, or a major part of them, shall settle and determine the claims to land under the said resolution. That the respective claimants shall give in their claims to the said commissioners, on or before the 1st day of April, 1784, and if approved and allowed, shall pay down to the commissioners, one dollar for every hundred acres of land, such claim to enable them to survey and apportion the said lands. The said commissioners shall appoint a principal surveyor, who shall have power to appoint his deputies, to be approved by the said commissioners, and to contract with him for his fees. That from and after the 1st day of April, 1784, the said commissioners, or a major part of them, shall proceed with the surveyor, to lay off the said hundred and fifty thousand acres of land on the northwest side of the Ohio River, the length of which shall not exceed double the breadth; and after laying out 1,000 acres, at the most convenient place therein for a town, shall proceed to lay out and survey the residue, and divide the same by fair and equal lots among the claimants; but no lot or survey shall exceed 500 acres. That the said commissioners, in their apportionments \*of the said [ \* 371 ] land, shall govern themselves by the allowances made by law to the officers and soldiers in the continental army. That the said commissioners shall, as soon as may be, after the said 149,000 acres shall be surveyed, cause a plat thereof, certified on oath, to be returned to the register's office, and thereupon a patent shall issue to the said commissioners, or the survivors of them, who shall hold the same in trust for the respective claimants, and they or a major part of them, shall thereafter, upon application, execute good and sufficient deeds for conveying the several portions of land to the said officers and soldiers.

" And be it further enacted, that a plat of the said 1,000 acres of land laid off for a town, shall be returned by the surveyor to the court of the county of Jefferson, to be by the clerk thereof recorded, and thereupon the same shall be and is hereby vested in William Fleming, John Edwards, Walker Daniel, John Campbell, George Rogers Clark, John Montgomery, Abraham Chaplain, John Bailey, Robert Todd, and William Clark, gentlemen, trustees, to be by them or any five of them laid off into lots of half an acre each, with convenient streets and public lots, which shall be and the same is hereby established a town, by the name of Clarksville. That after the said land shall be laid off into lots and streets, the said trustees, or any five of them shall proceed to sell the same, or so many as they shall judge expedient, at public auction, for the best price that can

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be had, the time and place of sale being previously advertised two months, at the court-houses of the adjacent counties, the purchasers, respectively, to hold their said lots subject to the condition of building on each a dwelling-house twenty feet by eighteen, at least with a brick or stone chimney, to be finished within three years from the day of sale; and the said trustees or any five of them are hereby empowered to convey the said lots to the purchasers thereof, in fee-simple, subject to the condition aforesaid, and the money arising from such sale, shall be applied by the said trustees in such manner as they shall judge most beneficial for the inhabitants of said town. That the said trustees or the major part of them shall have power, from time to time, to settle and determine all disputes concerning

the bounds of said lots, and to settle such rules and orders [ \* 372 ] for the regular building thereon, \*as to them shall seem best and most convenient; and in case of death, removal out of the county, or other legal disability of any of the said trustees, the remaining trustees shall supply such vacancies by electing others, from time to time, who shall be vested with the same powers as those particularly nominated in this act. The purchasers of the said lots, so soon as they shall have saved the same according to their respective deeds of conveyance, shall have and enjoy all the rights, privileges, and immunities, which the freeholders and inhabitants of other towns, in this State, not incorporated, hold and enjoy. If the purchaser of any lot shall fail to build thereon within the time before limited, the said trustees, or a major part of them, may thereupon enter into such lot, and may either sell the same again, and apply the money towards repairing the streets or in any other way for the benefit of the said town, or appropriate such lot to the public use of the inhabitants of the said town."

"An act to amend an act, entitled 'an act for surveying and apportioning the lands granted to the Illinois regiment, and establishing a town within the said grant,' passed the 10th of December, 1790. Be it enacted by the general assembly, that so much of the act entitled 'an act for surveying and apportioning the lands granted to the Illinois regiment, and establishing a town within the said grant' as requires that 1,000 acres of land for a town shall be laid off into half-acre lots, and each to be improved by building, subject to the condition of building on each a dwelling-house twenty feet by eighteen at least, with a brick chimney, to be finished within three years from the day of sale, is hereby repealed.

"The trustees of the said town are hereby directed to convey to those who have already purchased a lot or lots in said town, titles in fee-simple, although the said lots may not have been improved agreeably to the requisitions of the said recited act.

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"And be it further enacted, that the said trustees or any five of them are authorized and required to sell at public auction the residue of the said 1,000 acres of land, for the best price that can be had for the same, at twelve months' credit, in lots not exceeding twenty acres, nor less than half an acre, taking from the purchasers bonds, with approved security, for the payment thereof, and when received, to be applied to the \*benefit of the said [ \* 373 ] town; notice of the time and place of such sale being previously advertised two months successively in the Kentucky Gazette.

"And be it further enacted, that the said trustees shall convey to the said purchasers, titles in fee; and that the said lots shall not be liable to forfeiture on account of any failure in improving the same, but that the titles thereof shall be absolute and unconditional, any thing in the said recited act to the contrary notwithstanding."

In pursuance of the act first above recited, the board of commissioners thereby constituted, appointed William Clark principal surveyor, and proceeded to lay off the 150,000 acres of land, and laid off for a town the said 1,000 acres of land, a plat of which was, by the said surveyor, returned to the court of the county of Jefferson, to be by the clerk thereof recorded, which survey and return is in the words and figures following, to wit, and of which survey the annexed map is substantially a copy, upon which the land in controversy is correctly represented between the letters X and Y, and between two dotted lines upon the margin of the river.<sup>1</sup>

"Surveyed 1,000 acres of land on the northwest side of the Ohio River, for the town of Clarksville, agreeably to an act of the assembly, entitled 'An act for the surveying and apportioning the lands granted to the Illinois regiment, and establishing a town within the said grant.' Beginning on the bank of the Ohio River, at a small white thorn, white oak, and hickory, a little below the mouth of Silver Creek; running thence north, crossing Silver Creek twice, 170 poles, to a sweet gum, beech, and sugar-tree; thence east, crossing said creek again, 326 poles, to three beeches; thence south 40° east, 86 poles, to a beech and sugar-tree; thence 176 poles, to a large sweet gum, sugar-tree, and dogwood, on the bank of Mill Creek; thence south, crossing said creek, 180 poles, to a sugar and two ash trees; thence east 158 poles, to three beeches; thence south, crossing Pond Creek, 280 poles, to \*the Ohio, at two white [ \* 374 ] ashes and two hickory trees; thence down the Ohio River, with its meanders, to the beginning. W. Clark, P. Surveyor."

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The said trustees, named in the above-recited act, entered upon

<sup>1</sup> The plat is omitted.

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the said 1,000 acres of land, and had the same laid off into streets and lots, and sold a part of the same; and as vacancies occurred by death, removal out of the county, or otherwise, the remaining trustees supplied such vacancies by electing others from time to time; so that, on the first day of July, 1827, the said lessors of the said plaintiff, to wit, Joseph Bartholomew, John Prather, Willis W. Goodwin, Andrew Fite, John Weathers, William D. Beach, Charles Fuller, Orlando Raymond, Isaac Howk, and Peter Bottorff, were the trustees of Clarksville, by being duly elected from time to time, under the provisions of the above-recited act.

At a meeting of the board of trustees of the town of Clarksville, on the 18th of March, 1803, the following resolution was adopted by the board, and entered on the book of their proceedings, to wit: "the trustees, taking into consideration the great advantage that would result to the trustees of the town of Clarksville and the public in general, by opening a canal round the falls of the Ohio, on the application of George Rogers Clark, it is resolved by the board, that the rights, privileges, and advantages of the ground between the front lots on the Ohio, and the Ohio from the upper line of the town of Clarksville, adjoining Isaac Bowman's lot, No. 1, in the Illinois grant, to the mouth of Mill Creek, be exclusively granted to William Clark, his heirs and assigns, to be appropriated to the use of opening a canal through any part of said slip of land, on which to erect mills, wharfs, storehouses, or any kind of waterworks that may be of public utility, or for the erection of gates, locks, &c., for the passage of boats, vessels, &c, reserving, however, between the south and eastwardly line of said front lots and the canal, the distance of 30 feet; for which privilege the said William Clark, his heirs and assigns, are to pay the trustees or their successors one per cent. on the production of all waterworks that may be erected on said canal, and five per cent. on the toll of all kind of craft that may pass through the said canal. Provided, however, that the said William Clark, his heirs and assigns, do complete the said \*canal for the erection of waterworks, within seven years from this day.

[ \*375 ] At a meeting of the trustees of the town of Clarksville, on the 5th day of December, 1807, the following order and resolution was adopted by said trustees, and also entered on their book of proceedings, to wit: "a memorial from William Clark, praying that the trustees will prolong the time for his complying with the conditions of a grant made to him by a former board of trustees, on the 18th day of March, 1803, of a slip of ground from the upper part of the town to the mouth of Mill Run, was read. On motion, it was re-

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solved, that a further time of three years be allowed for complying with the condition of said grant, on condition that the said William Clark, his heirs, &c., shall relinquish, under the former grant, the distance of 30 feet reserved for a street between the front lots and any canal that may be opened, making a space of 60 feet the whole distance between such canal and said front lots, and that the former grant shall not extend further than to the lower basin, and that the said William Clark, his heirs, &c., shall bind himself, his heirs, &c., to build and keep up good and sufficient bridges across said canal at the intersection of every cross street, and to erect, within the period mentioned, to wit, by the 18th of March, 1813, a mill or mills, to be of public utility, or open a canal agreeably to the conditions of the former grant, and to reserve to the trustees the stone in the river not necessary for the uses of effecting and continuing the improvements therein contemplated.

On the 21st of November, 1810, an act of the general assembly of the territory of Indiana was passed in the words and figures following, to wit: "An act for the relief of Daniel Fetter, James Hughes, and Solomon Fuller.

" Whereas, it has been represented to the general assembly of this territory, by sundry petitions and other documents, that by the act of the State of Virginia incorporating the town of Clarksville in this territory, the trustees thereof were authorized to dispose of the land upon which said town was laid off, in half-acre lots, at public auction or otherwise, as they might think proper; and whereas the said trustees, by their orders and resolutions, did dispose of a certain part of said town to General William Clark, in fee conditional, who transferred the \*same to the aforesaid Fetter, Hughes, [ \* 376 ] and Fuller; and whereas it seems to have been the intention of the legislature of Virginia to subject the lots and land whereon the said town of Clarksville was laid off, to the control and disposition of the trustees of the said town, who, for the benefit of the proprietors therein, and for the interest of the public at large, did dispose, *en masse*, in the manner aforesaid, of a number of lots; and it appearing by the memorial of the said Fetter, Hughes, and Fuller, that the intention is to erect, for the public utility and convenience, mills and other waterworks on the said ground.

" Sect. 1. Therefore, be it enacted by the legislative council and house of representatives, and it is hereby enacted by the authority of the same, that the said Daniel Fetter, James Hughes, and Solomon Fuller, their heirs and assigns, be and they are hereby considered, and shall be taken, deemed, and holden, as the legal and equitable proprietors of the lots and land contained in the orders and resolu-

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tions of the said board of trustees, and the deed of transfer thereof from the said William Clark, subject, nevertheless, to the terms and conditions upon which the same was granted by the said board of trustees to the said William Clark." Passed November 21, 1810.

The said William Clark, prior to the passage of the act last above recited, had transferred his interest in and to the said slips of land, mentioned in said resolutions of the said trustees of Clarksville, to the said Fetter, Hughes, and Fuller, and some of the persons composing the board of trustees of Clarksville at that time, individually signed the petition of said Fetter, Hughes, and Fuller, to the said general assembly, for the passage of the above-recited act.

Fetter, Hughes, and Fuller entered upon the said slip of land, under the aforesaid orders and resolutions of said trustees, and erected thereon, on the margin of the Ohio River, a saw-mill, with a pair of mill-stones for grinding, in the fall of the year 1810, which mill was shortly after swept away by the floods. That in the year 1812, they erected and put into operation a grist-mill, of public utility, on the same slip of land, and on the margin of the Ohio River, which remains unto this day; that, to furnish a head of water for said mill, they cut through a ridge of rock in the bed of said river, lying be-

tween a channel of said river next the shore and an outer [ \*377 ] channel, \* by which the water from the outer channel was brought into the channel next the shore; and that they expended in making said improvements from \$12,000 to \$20,000.

At a meeting of the board of trustees of the town of Clarksville, on the 17th day of December, 1816, the following resolution was adopted, and entered on the book of said trustees, to wit: "On motion of Willis W. Goodwin, resolved, that the clerk of this board be directed to call on Messrs. Fetter and Hughes, assignees of William Clark, and inform them that it is the request of this board that they do make out and exhibit, at our next meeting, an accurate statement of all the productions of the waterworks, mills, canals, &c., erected on the slip of ground granted them by the trustees of Clarksville, since their commencement to the present date, and that the same be supported by affidavit." At a meeting of the said board of trustees on August 18, 1817, the following entry and order were made by said trustees, on the book of their proceedings, to wit: "Messrs. Fetter and Hughes produced to this board a statement of the quantity of flour manufactured at their mills, on the slip of ground granted to them by the trustees of the town of Clarksville, from the commencement to the 1st day of January, 1817, showing the net proceeds thereon, by which it appears they are indebted to the trustees the

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sum of \$69.10 $\frac{1}{2}$ , and it was ordered that they pay the same to the clerk of this board."

"Shortly after the making of the order last above recited, the said Fetter and Hughes paid to the clerk of the said board of trustees the sum of \$69.10 $\frac{1}{2}$ , in pursuance of said order. The said Fuller duly transferred his interest in said slip of land and appurtenances to said Fetter and Hughes, and said Fetter transferred his interest in the same to said Hughes, defendant herein, who, at the time of the commencement of this suit, was in possession of said slip of land and appurtenances. The said slip of land is a part of the 1,000 acres laid off for a town, as above stated, and delineated on the map aforesaid, and is the land in the plaintiff's declaration mentioned; and the said trustees of the town of Clarksville, on the 1st day of September, 1826, duly notified the said defendant to quit the possession of said slip of "land and appurtenances, on or before the [ \*378 ] 18th day of March then next, and defendant refused, and still refuses to quit possession thereof. It is agreed that the parties and the court shall not be precluded by this statement of facts from inferring the existence of such other facts as may reasonably and properly be deduced from those stated."

The district court rendered judgment in favor of the plaintiffs in the ejectment, and that judgment is now before this court on a writ of error.

Questions both new and intricate have arisen in this cause, and the doubts we have entertained respecting some of them were not easily removed.

The plaintiffs in error deny that the act of 1783, from which the trustees derive their title, could pass any legal estate to them in the lands which are the subject of it.

The act appoints commissioners, who are to proceed with the surveyor, from and after the 1st day of April, 1784, to lay off the said 150,000 acres of land on the northwest side of the Ohio River; and after laying out 1,000 acres at the most convenient place therein for a town, shall proceed to lay out and survey the residue, and to divide the same by fair and equal lots among the claimants. A plot of the survey of the 149,000 acres thus to be divided, is, when completed, to be returned to the register's office, "and thereupon a patent shall issue to the said commissioners, or the survivor or survivors of them, who shall hold the same in trust for the respective claimants." They are directed to execute deeds, &c.

This act empowers the commissioners to receive the claims of the several officers and soldiers of the Illinois regiment, and to cause the survey to be made; but no legal estate passes to them until the pa-

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tent shall be issued on the survey. The date of the patent does not appear, but the survey on which it was to be issued could not be made until after the 1st of April, 1784, and consequently the patent must have been issued on a subsequent day.

The law further enacts that a plat of the said 1,000 acres, directed to be laid off for a town, shall be returned by the surveyor to the court of the county of Jefferson, to be by the clerk thereof [ \* 379 ] recorded, and thereupon the same shall be and is hereby vested in William Fleming, &c., trustees, to be by them, or any five of them, laid off into lots, &c.

The time when this plat was returned is not stated, but it must have been after the 1st of April, 1784.

Previous to that day, in December, 1783, Virginia passed an act ceding the territory she claimed northwest of the River Ohio to the United States, and the deed of cession was executed on the 1st of March, 1784. This deed contains the following, among other reservations: "That a quantity not exceeding 150,000 acres of land, promised by this State, shall be allowed and granted to the then Colonel, now General George Rogers Clark, and to the officers and soldiers of his regiment who marched with him when the posts of Kaskaskia and St. Vincent were reduced, and to the officers and soldiers that have been since incorporated into the said regiment, to be laid off in one tract, the length of which not to exceed double the breadth, in such place on the northwest side of the Ohio as a majority of the officers shall choose, and to be afterwards divided among the said officers and soldiers, in due proportions, according to the laws of Virginia."

The plaintiff in error contends that, as the State of Virginia had conveyed all her territory northwest of the River Ohio to the United States, before any legal title was vested in the commissioners or trustees appointed by the act of 1783, the title at law was vested in the United States, and could pass only from them; that the reservation in favor of Clark's regiment is not an exception of so much land from the deed of cession, but a stipulation that congress shall comply with the promise made by Virginia to that regiment; consequently that the plaintiffs in ejectment had no legal title.

Had the court been required to expound these laws immediately after the deed of cession was executed, it is probable that the construction made by the plaintiff in error would have been adopted. But the opposite construction has prevailed, and all the titles in that reserve depend upon it. It is too late to controvert it.

The title of the plaintiffs in ejectment has been contested on other ground, which is more tenable.

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The act directs the plat for the town to be returned to the office of Jefferson to be recorded, and declares that "thereupon the same shall be and is hereby vested in William Fleming, [ \* 380 ] &c., trustees, to be by them or any five of them laid off into lots of half an acre each, with convenient streets and public lots, which shall be and the same is hereby established a town, by the name of Clarksville." The act proceeds to prescribe the duties and the powers of the trustees. They are to sell the lots in the manner and on the conditions required by the law, to convey them to the purchasers, to determine all disputes concerning their bounds, and to settle rules and orders for regular building thereon. This enumeration of duties and powers is concluded with the following provision : " And in case of death, removal out of the country, or other legal disability of any of the said trustees, the remaining trustees shall supply such vacancies, by electing others from time to time, who shall be vested with the same powers as those particularly nominated by this act." It is also enacted that "if the purchaser of any lot shall fail to build thereon within the time before limited, the said trustees, or a major part of them, may thereupon enter into such lot, and may either sell the same again," "or appropriate such lot to the public use of the inhabitants of the said town."

The legal title is undoubtedly vested in William Fleming and the other persons who are named as trustees of the town. The possession of this legal estate, however, would not have enabled them to perform the various acts which were necessary to the accomplishment of the object of the legislature. The thousand acres intended as a town, is to be laid out by these persons in their character of commissioners ; and after the plat thereof shall be recorded, it is vested in them by name, after which the law prescribes their duties and powers. These are expressly enumerated. They do not grow out of the estate, but are conferred by the words of the act. Had the title been vested in other persons, the same powers might have been conferred on and exercised by the trustees of the town. No one of their powers depends on their possessing the legal title. They might lay off the town in lots and streets, sell and convey the lots, determine their boundaries, and settle rules and orders for the regular building thereon, although the mere title should reside in others. The legal title is not identified with these powers, or connected with them by the words of \* the law. The grantees [ \* 381 ] are made trustees, but they receive the grant as individuals ; and the mere legal estate must descend according to the law of descents, unless otherwise directed by the particular statute.

No one of the persons in whom the land is vested by the act, nor  
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any person claiming title under any one of them, is a party to this ejectment. The inquiry then is, has the legal title, which was vested in William Fleming and others, been devested by the act, and transferred to the defendants in error? This must be determined by the act itself. The words are, "in case of death, &c., of any of the trustees, the remaining trustees shall supply such vacancies by electing others, from time to time, who shall be vested (not with the same estate, but) with the same powers as those particularly nominated in this act." If the estate be not indispensable to the existence or exercise of the powers, and we think it is not; if the powers do not grow out of the estate, but are conferred by special words in the act, no necessity is perceived for supplying words which are not used in the act, and implying a transfer of the estate which the legislature has not made. It is unquestionable that no inconvenience would result from such a construction; and we may conjecture that, had it occurred to the legislature that the transfer of the estate to the new trustees might be useful, it would have been directed; but we cannot do that which the law has not done; we cannot take a trust estate from William Fleming and others, and vest it in their successors as trustees, when the law does not make the transfer.

It is probable that the legislature contemplated the immediate execution of the powers conferred by the act, which would transfer the legal estate to the purchasers. They do not appear to have contemplated the permanent residence of the legal estate in the body of the trustees, for the purposes of the act. If the trustees were to do any thing in virtue of the estate, and not of their special powers, we might expect it to be a reentry for breach of the condition contained in the deeds they made. Yet, after providing for their continuance, even this power is expressly given to them. The legislature appears to have lost sight of the legal estate, and to have relied entirely on the powers given to the trustees and their successors, for the accomplishment of their object. The powers are given [ \* 382 ] to the \*trustees and their successors; the estate is not given to their successors. We do not think the grant of the powers draws after it the estate. If any use is to be made of the estate which cannot be effected by the employment of the powers, it still remains, we think, in the original grantees or their heirs. If any part of the one hundred and forty-nine thousand acres has not been conveyed, the title to such part remains in the same persons. The inconvenience of resorting to the holders of the legal title is the same in both cases.

The court has not come to this conclusion without considerable doubt and difficulty; but, pursuing the words of the statute, and

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finding in them no transfer of the estate, we must consider it as remaining where it was placed by the legislature.

The trustees contend that the defendants below were estopped from denying their title, by the agreement of the 18th of March, 1803. The legal effect of that agreement, they say, was to create a tenancy from year to year, and consequently to establish the relation of landlord and tenant between the trustees and those who claim under it.

That a lessee will not be allowed to deny the title of his lessor, is admitted; but it is not admitted that a contract executed for the purpose of conveying and acquiring an estate in fee, but wanting those legal formalities which are required to pass the title, may be converted into an agreement contemplated by neither party; and by this conversion estop the purchaser, while it leaves the seller free to disregard his express stipulations.

The resolutions entered into by the board of trustees, on the 18th of March, 1803, constitute a contract which was intended by all parties to invest William Clark with a permanent estate. The trustees resolve "that the rights, privileges, and advantages of the ground" described in the resolution, "be exclusively granted to William Clark, his heirs and assigns, to be appropriated to the use of opening a canal through any part of the said slip of land, on which to erect mills, wharves, storehouses, or any kind of waterworks that may be of public utility, or for the erection of gates, locks, &c., for the passage of boats, vessels, &c." For this privilege, the trustees reserved "one per cent on the production of all waterworks that may be erected on the said canal, and five per cent on the toll of all kind of craft that may pass through said canal." To this \*grant was annexed this provision: "Provided, however, that the [ \*383 ] said William Clark, his heirs and assigns, do complete the said canal for the erection of waterworks within seven years from this day." This time was afterwards extended to ten years.

The assignees of William Clark took possession of the premises under this agreement, and sold to others, who have expended from one to two thousand dollars on the work; and have erected a saw-mill, which has been carried away; and a grist-mill, which is now in operation, and of great public utility.

It is impossible to doubt the intention of the parties to this contract. The grant for which the trustees stipulate is to William Clark, his heirs and assigns. A tenancy from year to year, is directly repugnant to this stipulation. The money to be expended on the great works in contemplation, is entirely inconsistent with any other than a permanent estate. The views of the parties are entirely defeated

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the contract is annulled, by treating it as one which the trustees might determine at their will, or at the end of any year. Had the contract been clothed with legal form, by the execution of a deed, such deed would have conveyed an estate to William Clark, his heirs and assigns. The reservation of the percentage on the building and canal, as the consideration of the grant, instead of a sum in gross, could not affect the permanence of the estate. The trustees could not have maintained an ejectment after the execution of such deed, unless some one of the conditions contained in it, on which a right to reenter was reserved, should be broken; which breach, it would be incumbent on the plaintiffs in ejectment to show. Had these resolutions then amounted to a deed, or had the trustees placed the purchaser, in point of law, in the situation in which both parties intended by the contract to place him, this ejectment could not have been maintained, on any other principle than the breach of some condition in the deed which authorized a reentry.

But a legal title has not been made, and those who claim under the contract cannot defend their possession by it in this action. The trustees themselves deny its validity for this purpose, and assert a title in opposition to it. While they would turn the pur-  
[ \*384 ] chaser out of possession, because this contract "has no legal operation in this action, they would give it a legal obligation on the defendant in the ejectment, which is to restrain him from making a defence which would protect his equitable rights under it. The contract binds him, but leaves them at perfect liberty. The moral policy of the law cannot permit this. It is forbidden by the clearest principles of justice. The case of *Blight's Lessee v. Rochester*, 7 Wheat. 535, asserts this doctrine in a case nearly resembling this. The plaintiff claimed under John Dunlap, whose title was not valid; but he insisted that the defendant must trace his title up to Dunlap, and therefore could not contest it. The court said: "If he claims under a sale from Dunlap, the plaintiffs themselves assert a title against this contract. Unless they show that it was conditional, and that the condition is broken, they cannot, in the very act of disregarding it themselves, insist that it binds the defendant, in good faith, to acknowledge a title which has no real existence."

Upon the authority of this case, and upon the sound principles of morality and justice which belong to the law, we do not think that the plaintiffs, while asserting a title against their contract, can be permitted to insist that the same contract binds the defendant to admit their title.

This opinion is founded on the idea that the action is brought to

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obtain possession against the contract, not for any failure to perform its conditions. The trustees themselves do not place their right to reenter and hold the premises on that ground. The case does not state a reentry for conditions broken; nor does it show expressly that any condition has been broken. If it be admitted that William Clark or his assignees would, in this case, be bound to acknowledge the title of the trustees, provided the trustees, on their part, acknowledge the obligation of their resolutions on themselves, it becomes necessary to inquire whether the conditions contained in those resolutions have been broken. What are those conditions?

The resolutions are not drawn with such distinctness as to make the object of the parties clearly intelligible; or to show the extent of the engagements into which Clark entered, so as not to be misunderstood.

They are introduced by a preamble stating the "advantages that would result" "by opening a canal round the falls of the Ohio." \* They then proceed to say: "On the application of [ \* 385 ] George Rogers Clark, it is resolved by the board, that the rights, privileges, and advantages of the ground between the front lots on the Ohio, and the Ohio from the upper line of the town of Clarksville," &c., "to the mouth of Mill Creek, be exclusively granted to William Clark, his heirs and assigns, to be appropriated to the use of opening a canal through any part of said slip of land, on which to erect mills, wharves, storehouses, or any kind of waterworks that may be of public utility, or for the erection of gates, locks, &c., for the passage of boats, vessels," &c.

The preamble undoubtedly indicates that the trustees contemplated "the advantage which would result from a canal round the falls," but whether they meant to bind Clark to make the whole of that canal, is to be determined by the resolutions declaring the purposes of the grant to him.

The canal which Clark was to make, was, it is presumed, to be made through the ground ceded to him by the trustees. This extends to the mouth of Mill Creek. The case does not state whether Mill Creek empties into the Ohio below the falls. If it does not, this fact would go far, in the construction of the resolutions. If it does, the fact or something equivalent should be shown in the case.

The resolutions add that the rights, &c., exclusively granted, "are to be appropriated to the use of opening a canal through any part of the said slip of land, on which to erect mills, wharves, storehouses, or any kind of waterworks that may be of public utility."

This canal is "to pass through any part of the said slip of land;" but is not required to pass through the whole of it, and to empty

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into the river at the mouth of Mill Creek. Its expressed purpose is to erect mills, wharves, &c., but the erection of all of them is not required, nor is the grantee himself required to erect any of them. The canal is to be adapted to the purpose, and if it be so adapted, the requisition of the resolution is complied with. An alternate application of the canal is allowed. The resolution proceeds to say, "or for the erection of gates, locks, &c., for the passage of boats, vessels, &c." These two members of the resolutions are not connected by the copulative "*and*," but by the disjunctive "*or*."

[ \*386 ] \*The resolution does not require that the canal should be fitted for both purposes, but is satisfied if it be fitted for either.

The limitation of time is, "provided, however, that the said William Clark, his heirs and assigns, do complete the said canal, for the erection of waterworks, within seven years from this day." Clark and his assignees are within the requirement of the proviso, if they complete the canal for the erection of waterworks within seven years, though no works of any description should be erected.

At a meeting of the trustees, held in December, 1807, this subject was again taken up. A further time of three years was allowed, on condition, among other things, that the former grant shall not extend further than to the lower basin, and that the said William Clark shall bind himself, his heirs, &c., "to build and keep up good and sufficient bridges across said canal, at the intersection of every cross street, and to erect within the period mentioned, to wit, by the 18th of March, 1813, a mill or mills to be of public utility, *or* open a canal agreeably to the conditions of the former grant, &c."

The alternative is given to Clark and his assigns, either to build a mill or mills to be of public utility, or open the canal.

The case states that the mill was erected, which remains to this day. It also states that in December, 1816, the trustees called on the assignees of William Clark for a statement of the production of the waterworks, which account was rendered, and the money appearing to be due on it was paid. We are not informed that there was any subsequent failure in the payment of the money which became due under the contract. We are not, therefore, at liberty to suppose that the conditions of the contract have been broken on the part of Clark's assignees. The trustees, then, to sustain this ejectment, must consider themselves as absolved from the contract. Acting upon this principle, they cannot set it up against the plaintiffs in error. They cannot be permitted, while denying its obligation on themselves, to enforce it on others. Both are free, or both are bound. We are of opinion that the plaintiffs in error were at liberty in this

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case to controvert the title set up by the trustees in the court below.

The assignees of Clark have relied upon an act of the territorial legislature of Indiana, passed in November, 1810, supplying \*the want of a conveyance; and declaring the assignees [ \*387 ] of the said Clark to be "the legal and equitable proprietors of the lots and land contained in the orders and resolutions of the said board of trustees," "subject, nevertheless, to the terms and conditions upon which the same was granted."

We do not mean to deny the right of the legislature to modify the future exercise of the powers possessed by the trustees of the town of Clarksville, provided they do not impair vested rights; but we are not prepared to decide this case on an act which changes the character and operation of a contract after it has been made.

This case has been decided in the state court of Indiana, and is reported in 1 Blatchford, 422. This court has considered that decision with the respect to which it is justly entitled. In that case, the court did not examine and decide on the legal title of the trustees, because legal effect was given to the contract so far as to defeat the action. The relation of landlord and tenant, therefore, was preserved between the parties, and bound both. That relation defeated the plaintiff's action, though it estopped the defendants from controverting his title. Notwithstanding the plain meaning of the contract made by the resolutions of March, 1803, to grant a permanent estate, yet that contract, though incapable of passing an estate at law to the extent intended, was capable of passing at law an estate from year to year, and in that action might be so construed. The necessary effect of this construction was the admission of the title of the lessor; but in this action, no legal effect whatever is given to the contract, and it cannot, therefore, estop the defendant from contesting the title asserted in hostility to it. We do not consider the case as depending on local law.

We are of opinion that the plaintiff below did not show title to the possession of the premises claimed in the declaration, and that there is error in the judgment of the court for the district of Indiana, in his favor.

That judgment is reversed, and judgment entered for the defendant.

Mr. Justice BALDWIN dissented.

WILLIAM W. WATTS AND ARTHUR WATTS'S EXECUTORS, AND WILLIAM W. WATTS, ARTHUR WATTS, JOSEPH SCOTT, AND ELIZABETH his Wife, Heirs and Legal Representatives of JOHN WATTS, deceased, Appellants, *v.* WILLIAM WADDLE AND ALEXANDER WADDLE'S ADMINISTRATORS, AND ALEXANDER WADDLE, AND WILLIAM, JOHN, LUCY, EDWARD, AND ARGUS WADDLE, Infants, by BENJAMIN G. LEONARD, their next friend, Children and Heirs of JOHN WADDLE, deceased, and WILLIAM LAMB.

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A court of equity will not force a doubtful title on a purchaser; and in this case such defects were found as precluded the vendor from having a decree of specific performance by the vendee.

Where the vendee is shown by the bill to have been in possession, and specific performance is refused, under the prayer for general relief, a decree for an account of rents and profits may be made against the vendee; and this court reversed the decree of the circuit court in order to direct such an account, though the claim for it was not made in the circuit court.

A court of chancery, having jurisdiction over the person who has the legal title to lands in another State, may, by a decree, force him to convey to the holder of the equitable title, for whom he stands as a trustee; but it cannot, by its decree, or through a deed of a commissioner, pass that title.

The facts appear in the opinion of the court.

*Creighton and Clay*, for the appellants.

*Leonard*, contrà.

[ \* 391 ] \* M'LEAN, J., delivered the opinion of the court.

This suit was brought into this court by an appeal from the decree of the circuit court for the district of Ohio. The bill was filed in that court by the complainant to compel the specific

[ \* 392 ] \* execution of a contract, entered into with the defendant,

Lamb, on the 1st day of November, 1815, by which the complainant bound himself to convey certain out-lots and other land, adjacent to the town of Chillicothe, to the said Lamb, for the consideration of \$4,716.66<sup>2</sup>. The conveyance was to be made on the 1st day of February ensuing, or so soon as a final decree should be rendered by the United States circuit court for the district of Ohio, in the suit then pending in said court, wherein the said Watts was complainant and Nathaniel Massie and others defendants.

That suit had been brought by Watts, against Massie and others, including the above defendant Lamb, to recover 1,000 acres of land, which included the land sold by the above contract, to which Watts derived title from Ferdinand O'Neal, who claimed under an entry

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made by virtue of a warrant which had been granted to him for military services. To recover this tract of land, Watts first brought a suit against Massie, in the federal court of Kentucky, charging him with having fraudulently surveyed the lands of O'Neal, so as to throw it within the lines of a survey, in the name of Powell, which was owned by Massie, or in which he had an interest. In this suit Watts prevailed, and an appeal being taken to the supreme court, the decree of the circuit court was affirmed. 6 Cranch, 148.

To carry this decree into effect in the State of Ohio, suit was instituted by Watts in the circuit court; and this was the suit referred to in the contract between Watts and Lamb.

By the decree in Kentucky, which was affirmed by the supreme court, O'Neal's entry, 509, was made to embrace the land specified in the contract; and the decree required Massie to convey to Watts all the land covered by the survey of the above entry, although within entries No. 503 and 2,462, amounting to 1,000 acres; and Watts was required to convey 1,000 acres, which were within the calls of entry 509. Neither of these conveyances has been executed.

A final decree was obtained in this suit in the circuit court for Ohio, in favor of Watts, in January, 1818. Neither Lamb nor Massie took an appeal in this case to the supreme court; but it was appealed by some of the defendants, who, it is stated, had no interest in the land now in dispute. A final decree in \* favor of [ \* 393 ] Watts was entered in the supreme court in September, 1822.

In the year 1818, it was ascertained that no patent had been granted on O'Neal's warrant, and, consequently, that Massie did not possess the legal title; but, on application, a patent was issued to Watts, on the 1st of March, 1826. It appears, however, that a patent had issued to the heirs of Powell, on an entry 503, on the 4th of November, 1818, which covered a part of the land that Watts had sold to Lamb.

Finding that the legal estate was vested in Powell's heirs, Watts commenced a suit against them in the circuit court of Kentucky, and obtained a decree for the land contained in their patent, which interfered with his title, in the fall of the year 1826.

Lamb having assigned the covenant to his co-defendant Waddle, in January, 1824, he commenced a suit against Watts for the recovery of the consideration paid, and at July term, 1826, obtained a judgment in the circuit court, for \$7,745.50, damages and costs.

On the 3d of July, before the judgment, Watts tendered to Waddle a deed in fee-simple for the land, in the contract agreed to be conveyed, with the costs of the suit, which he refused. A bill was then filed by Watts to enjoin the judgment and compel the defendants to accept of a deed. The bill contains also a prayer for general relief.

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By the decree of the circuit court this bill was dismissed, from which the complainant appealed to this court. Watts having died since this suit has been pending in this court, it is now prosecuted by his heirs.

The complainants insist that, under all the circumstances of the case, they are entitled to a specific execution of the contract. Of this there can be no doubt, if it shall appear that there has been a substantial compliance with the covenant on the part of their ancestor. The aid of a court of chancery will be given to either party who claims a specific execution of a contract, if it appear that, in good faith, and within the proper time, he has performed the obligations which devolved on him.

It is insisted that the delay which occurred in making a [ \* 394 ] \*deed was unavoidable, and is in no manner attributable to negligence or want of good faith in Watts. That it grew out of facts which were alike unknown to him, and the defendant Lamb, at the time the contract was made. That the defendant Lamb and his assignee Waddle have had the unmolested possession of the land purchased, enjoying the rents and profits of it, and that no circumstance has been proved which goes to show that the defendants, or either of them, have suffered any injury from the delay in making the deed.

Various facts are adverted to, which go to prove vigilance on the part of Watts, in prosecuting different suits and in other respects, in order to obtain the legal title, that he might make the conveyance. And that, so soon as he was enabled to do so, he lost no time in tendering the deed duly executed, and also the costs which had accrued on the action at law.

On the part of the defendants, it is contended that, as the contract was the result of a compromise, they are entitled to a strict execution of it.

Under a purchase which Lamb had previously made of Massie and others, he was in possession of the land embraced by the contract, at the time it was concluded. And he was, no doubt, induced to enter into the contract with Watts under the impression that he had the equitable and would soon possess himself of the legal title. The suit then pending had been brought for that purpose; and as Lamb was one of the defendants, and had no title, either legal or equitable, he was desirous of obtaining a title from Watts.

If Lamb did not enter into the possession under Watts, it seems that he acknowledged Watts to possess the better title; and by making the contract with him, was willing to hold the possession under him.

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It is not perceived, therefore, that there is any thing in the circumstances under which this contract was made, which would take it out of the rule of law generally applicable to cases of contract for the purchase of real property. The contract, it is true, was the result of a compromise respecting a legal controversy; but it was entered into with a full knowledge, on the part of Lamb, that Watts did not possess the legal title, but expected to obtain it by a final decree in the case referred to.

\* A final decree was obtained in that case, in the circuit [ \*395 ] court, in January, 1818; and it is insisted that it was the duty of Watts, at that time, to execute the conveyance, and that, not having done so, he is guilty of such negligence as to prevent the relief he now asks in equity.

In the contract, there was a reference to the final decree of the circuit court; but as the decision of that court was not final in the case, and as an appeal was actually taken, by some of the defendants, to the supreme court, it may reasonably be inferred that this contingency was within the calculation of both parties at the time of the contract. It must have been known to them, that an appeal would vacate the decree of the circuit court, and that after it was taken, any conveyance made under such decree would be inoperative. The final decree, therefore, in the circuit court, as referred to in the contract, could only mean, in the event that the decree of that court should finally determine the matter of controversy. But if an appeal should be taken from such decree, then the final decree should be made in the supreme court. There can be no difficulty in coming to the conclusion that both parties referred to a final decision of the case, and to such a decree as should vest the legal title in Watts. And as such a decree was not obtained until 1822, it is clear that until that time no negligence is imputable to Watts.

It would be within the spirit of the contract to say, that Watts was bound to use ordinary diligence in the prosecution of the suit, both in the circuit and supreme courts. But there is no charge of a want of diligence in this respect.

Until 1818, Watts, as well as the defendants, supposed that the legal title was vested in Massie. There is no ground to impute fraud or imposition to Watts, in reference to this fact. When he made the contract, and up to the time specified, there can be no doubt that he believed a final decree against Massie would give him the legal title. When he made the contract with Lamb, had he known the fact that Massie had not the legal title, and concealed it, equity could give him no relief. The concealment would have been a fraud on Lamb, which would have enabled him to annul the contract. But Watts acted in good

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[ \* 396 ] faith, and being mistaken, unless some injury consequently resulted to Lamb, or an unreasonable delay followed, equity would look with a favorable eye to the specific execution of the contract.

Finding that the legal title was vested in Powell's heirs to a part of the land embraced by the contract, Watts commenced a suit in chancery against them in the circuit court of the United States of Kentucky, and obtained a final decree for the land. In pursuance of this decree, a commissioner appointed by the court, under a statute of Kentucky, executed a conveyance in the fall of 1826.

In July, 1826, a few months after Watts obtained a patent for the land, he tendered a deed to Waddle; and in November, 1826, after the decree was obtained against Powell's heirs, it is insisted a deed was again tendered; both of which were refused by the defendant, Waddle.

The suit of Waddle, to recover back the consideration money, was commenced in October, 1824; and prior to its commencement, offered to surrender the possession of the premises.

When this bill was filed by Watts, it appears, from the facts in the case, that he did not possess the legal title. The conveyance under the decree against Powell's heirs, had not, at that time, been executed. But this deed being afterwards obtained, Watts may be considered as vested with all the title conveyed by it; and also the title under the patent, which was granted to him; and the question arises, under these facts, and other circumstances in the case, whether the complainants are entitled to a specific execution of the contract.

It appears from certain depositions taken in the cause, in the spring of 1829, that this property, since the purchase, has depreciated in value one half; but the witnesses do not state how much of that depreciation has taken place since 1822.

The defendants' counsel insist that, independent of the objection founded upon the lapse of time, there are several material defects in the title of Watts; and that the court cannot, under such circumstances, compel the defendants to receive it.

It is objected, that a suit is now pending in the general court of Kentucky, by one Henry Banks, who claims the warrant on which the entry was made, under which Watts claims; and it is alleged that the decree against Powell's heirs did not give Watts a good title.

[ \* 397 ] \*In October, 1821, it appears Banks filed his bill against John Watts and the unknown heirs of Ferdinand O'Neal, in which he stated that O'Neal was entitled to land, for services as a captain, in the Virginia line on continental establishment, amounting to at least four thousand five hundred acres; and that, for a valuable consideration, he transferred his right to one Thomas Wash-

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ington; that Washington, in November, 1790, authorized one Thomas Shields to make sale of said lands; and that on the 1st of March, 1791, for a valuable consideration, he transferred the said lands to the complainant.

He further states, that after the above assignment to Washington, O'Neal fraudulently transferred a warrant for four thousand acres of said land, and that a certain John Watts had procured grants for a part of the said four thousand acres, under an assignment from Francis and Charles Scott, made on the 11th of October, 1799. And it is alleged that Watts had full notice of the previous transfer by O'Neal, before the grants were obtained. The bill contains a prayer for a conveyance of the land specified, and also for general relief.

The assignments set forth in the bill are proved by the exhibits in the case.

Process appears to have been served on Watts the 24th October, 1821, and the cause was regularly continued until August, 1826; when an order was made, that public notice be given in a newspaper printed at Frankfort, to the unknown heirs of O'Neal, under a special statute of Kentucky. And from this time the cause seems to have been regularly continued, up to January term, 1829.

It is insisted, by the complainants' counsel, that the pendency of this suit cannot affect, injuriously, the title of Watts; as the court of Kentucky has not jurisdiction of the subject-matter, so as to transfer the title in land to Ohio; and that, from the dilatory manner in which the suit has been prosecuted, it is manifest that Banks can have no expectation of success.

The general court of Kentucky have jurisdiction of the controversy; and as process was served on the defendant, Watts, their powers are ample to enforce their decree, *in personam*, or to direct the execution of a deed, should the land be decreed, by a commissioner, as the statute of Kentucky authorizes.

\* Banks has certainly been dilatory in the prosecution of [ \* 398 ] his suit; but it is by no means clear that, by his negligence in this respect, he has lost any of his original equity against Watts. And this is the question now under consideration. It is not the case of an innocent purchaser, for a valuable consideration, without notice; but, the inquiry is limited to the rights of the litigant parties. If Banks has been negligent, what vigilance has been shown by Watts, to terminate the controversy?

It is said there has been no rule for answer on Watts. The record does not show whether there has been a rule for answer; and as such a rule, if entered, ought to appear, it may fairly be presumed that no such order has been taken. But this did not preclude Watts from

taking an order, which would compel the complainant either to dismiss his bill, or bring it to a hearing.

It would seem, therefore, if Banks has been negligent in pursuit of his rights, Watts has shown no vigilance in the defence of his.

No part of the proceeding in the suit against Powell's heirs, in the circuit court for Kentucky, is contained in the record, except the decree. The persons named defendants, are John M. Powell, Francis Powell, Robert Powell, Margaret P. Bledsoe, formerly Margaret P. Powell, wife of Joseph Bledsoe, Nancy J. Rickets, wife of Charles H. Rickets, formerly Nancy J. Powell, Mary B. Jones, wife of William Jones, formerly Mary B. Powell, and William M. Powell, and Susan W. Powell, —— Carr, and Fanny his wife, heirs and representatives of Robert Powell, deceased. By the decree, the defendants were required to convey to the complainant, six hundred and eight acres of land particularly described in the decree. And if the defendants or any of them failed to make the conveyance, the court appointed John H. Hanna commissioner, under the statute of the State, to make the deed. It is admitted that the deed was duly executed by the commissioner.

As the record of this case is not before the court, it does not appear whether process was served on all the above defendants, [ \* 399 ] nor whether they answered the bill. But in reference \* to the object for which this decree is introduced, the preparatory steps may be presumed to have been regularly taken.

Several objections are made to this decree. It being entered against *femes covert*, it is insisted that the interest of the husbands cannot be affected by it. This seems to be considered as a matter of form, by the complainants' counsel; and if it be a matter of substance, it is contended that the full record would show that all necessary and proper parties were made by the bill. And it is denied that the decree furnishes any evidence that the husbands of the females named as having been married, were living at the time of the decree.

The females are stated to be the daughters of Powell, and the wives of the persons named. This must be considered as conclusive of the fact that their husbands were living. If they had been dead, the females would not have been named as the wives of certain persons. Under the circumstances, no presumption arises that the husbands are dead; nor can it be necessary for those who impeach the decree to show that they are living.

As the husbands of the daughters of Powell, where issue has been born, have a life-estate in the premises in question, their interests cannot be affected in a case where they are not parties.

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That some or all of the persons referred to are possessed of this interest, may fairly be presumed from the circumstances. A decree, to be operative, must contain sufficient certainty in itself. It cannot be aided by presumption.

It is clear that the record at length could not obviate this objection. The defendants are named, and there is no reference by which the decree could be made to operate on the rights of the husbands. But if it were admitted that a full record might obviate this objection, it is not incumbent on the defendants to produce it. It rests with the complainants to make out their case. To obtain the object of their bill, it is essential to show that a clear title was tendered to the defendant Waddle, or at least, that they are able to make him a good title. And this they cannot show unless there was a full divestiture of the title from Powell's heirs.

It is also objected that the widow of Robert Powell is still living, and is entitled to her dower in the premises. She is proved to have been living since the commencement of this suit, [ 400 ] and there is no evidence of her death; and one of the witnesses states that she had an agent, or assignee at Chillicothe a few years since, claiming her right of dower.

But it is contended that the widow of Powell could not recover dower in this land, as, at most, he could only be considered as holding the land in trust for Watts. In proof of this, the decree against his heirs is referred to.

If such were the fact, under the law of Ohio, the widow would not be entitled to her dower; but the decree referred to could not be considered as conclusive of the rights of the widow. That decree may have been entered by collusion, or under circumstances that would not bind the parties to it, if the proper steps were taken to set it aside. It is presumed that the widow, in setting up her right of dower, would be permitted to show the nature of the title under which her husband claimed. This claim, therefore, may not be so destitute of all merit and legal propriety, as the counsel for the complainants seem to consider it.

But the most decisive objection to the decree against Powell's heirs is, it is contended, that it does not vest the legal title in Watts.

A decree cannot operate beyond the State in which the jurisdiction is exercised. It is not in the power of one State to prescribe the mode by which real property shall be conveyed in another. This principle is too clear to admit of doubt; but it is insisted that the deed executed by the commissioner, under the decree, by virtue of a statute of Kentucky, was a legal conveyance in that State, and as such, by a statutory provision, is good in Ohio.

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The words of the statute referred to are, "that all deeds, mortgages, and other instruments of writing, for the conveyance of lands, tenements, and hereditaments, situate, lying, and being within this State, which hereafter may be made and executed and acknowledged or approved in any other State, territory, or country, agreeably to the laws of such State, territory, or country, or agreeably to the laws of this State, such deed, mortgage, or other instrument of writing shall be valid in law."

The deed executed by the commissioner in this case, must be considered as forming a part of the proceedings in the court [ \*401 ] \* of chancery ; and no greater effect can be given to it than if the decree itself, by statute, was made to operate as a conveyance in Kentucky, as it does in Ohio.

The question then arises, whether, by a fair construction of the above provision, it is in the power of a court of equity, sitting in Kentucky, by force of its decree, to transfer real estate in Ohio.

Can this effect be given to such decree by this statute ? It is believed that no State in the Union has subjected the real property of its citizens to the exercise of such a power. Neither sound policy nor convenience can sustain this construction ; and, unless the language of the statute be imperative, no court could sanction it.

The legislature of Ohio could never have intended, by this provision, to place the real property of the citizens of that State at the disposition of a foreign court. The language used in the act does not require such a construction. It refers to deeds executed by individuals in any other State ; and not to conveyances made by the decree of a court of chancery. This is the true import of the section, and it does not appear that the courts of Ohio have given it a different construction. Thus construed, it promotes the convenience of non-residents who own lands in Ohio, and may desire to convey them ; and in no point of view can it operate injuriously to the interests of citizens of the State.

In this view it appears that Watts did not acquire the legal title from Powell's heirs, under the deed of the commissioner ; and consequently he was unable to convey the legal title to Waddle.

The objections, then, to the deed tendered by Watts are, that the husbands of the *femes covert* named in the decree, were not made defendants, and that there is no divestiture of their right ; that the right of dower remains in the widow of Robert Powell ; and that, at most, Watts derived only an equitable estate under the decree against Powell's heirs.

These objections are deemed decisive by the court. Under the

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deed tendered to Waddle, he could not defend himself against an action of ejectment commenced by Powell's heirs, or by any other persons claiming under a legal conveyance from them. A decree of a court in Ohio, having jurisdiction \* of the sub- [ \* 402 ] ject-matter, is necessary to give a legal effect to the decree in Kentucky. And even if this had been done, there would still exist serious objections to the title.

The principle is too well settled to require any reference to authority in support of it, that a vendor, to entitle himself to a specific execution of the contract, must be able to make a clear title. No court of chancery will force a doubtful title on the vendee; and it is always necessary that the vendor should not only show a proper degree of vigilance on his part, but that in all things he had complied, or was able to comply, with the contract when he seeks a specific execution of it.

Although, in the present case, a willingness has been shown by Watts to convey to Waddle the land embraced in the contract, it is evident that he cannot convey a good title. The title is not only shaded with doubt, but there are defects which cannot be obviated, except by the action of a court of equity. The contract which is the foundation of this suit, was entered into by Lamb to get clear of a legal controversy; and if his assignee shall be compelled to accept a title radically defective, he would be left in a worse condition than Lamb was in before the compromise. The consideration money has all been paid, and the result to the assignee would be, should he be compelled to receive the deed tendered, one or more lawsuits. The court are therefore clear, that the complainants, for reasons stated, are not entitled to a specific execution of the contract.

A new ground of relief has been assumed in the argument here, that was not made in the circuit court; which is, that although this court should be of the opinion that a specific execution of the contract ought not to be decreed, still, the complainants are entitled to a decree for the rents and profits of the land while it was in the possession of the defendants.

The defendants object to this relief, first, because the bill is not so framed as to embrace it; and, secondly, because this claim was adjusted in the action at law, or might have been set up to lessen the demand of the plaintiff in that action.

There is no rule of court or principle of law, which prevents the complainants from assuming a ground in this court, which was not suggested in the court below; but such a course may be productive of much inconvenience and of some expense.

Although there is no specific prayer in the bill to be paid the

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[ \* 403 ] \*rents and profits, yet the court think that, under the general prayer, this relief may be granted. Under this prayer, any relief may be given for which the basis is laid in the bill. In this case the possession of the land by the defendants is alleged, and the demand for rents and profits would result from this fact.

There is no pretence that this demand was taken into view in the action at law. As it consisted of unliquidated damages, it was not a proper subject for an offset; and it appears that the judgment at law was rendered for the consideration money and interest.

That part of the decree of the circuit court which refused a specific execution of the contract, is affirmed; but, in order to afford relief for the rents and profits, the decree dismissing the bill is opened, and the cause remanded for further proceedings.

19 P. 177; 17 H. 447; 22 W. 253.

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LOUIS M'LANE, EXECUTOR OF ALLEN M'LANE, deceased, Claimant of a Moiety of the Forfeiture of the Ship Good Friends, Appellant, v. THE UNITED STATES.

6 P. 404.

The circuit court, having pronounced a decree of condemnation in a case of seizure, has jurisdiction of an application by a collector to award to him his share of the proceeds; it is an incident to the possession of the principal cause.

The collector's right to a distributive share of a forfeiture is inchoate, and may be released by the government, until the proceeds are actually received for distribution; but whatever is reserved out of the forfeiture, is reserved as well for the seizing officer, as for the government.

This principle applied to the reservation of double duties, on the release of certain cargoes under a special act of congress.

THE case is stated in the opinion of the court.

*Jones and Sergeant*, for the appellant.

*Taney, (attorney-general,) contra.*

[ \* 423 ] \* STORY, J., delivered the opinion of the court.

This case comes before the court upon an application made by Allen M'Lane, collector of the district of Delaware, to the circuit court of that district, for a decree of distribution of the forfeiture accruing from the seizure and condemnation of the ship Good Friends and cargo, one moiety whereof is claimed by the said collector, as seizing officer; there having been a remission of the

[ \* 424 ] forfeiture by the secretary of the treasury, under the \*authority of the act of congress of the 29th of July, 1813, c. 34.]

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<sup>1</sup> 6 Stats. at Large, 122.

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Upon the conditions required by that act, the only controversy existing in the cause is between the United States and the collector, in respect to his distributive share. The United States and the collector agreed upon a special statement of the facts; upon which it was further agreed that a decree, *pro forma*, should be entered by the circuit court against the collector, for the purpose of a final decision in the supreme court; and by an appeal from the *pro forma* decree, so rendered, the cause now stands before this court.

Upon the argument at the bar, some objection was suggested, though not strenuously urged, against the jurisdiction of the circuit court to entertain the cause under the peculiar circumstances. But this objection appears to us not well founded. Where a sentence of condemnation has been finally pronounced in a case of seizure, the court, as an incident to the possession of the principal cause, has a right to proceed to decree a distribution of the proceeds, according to the terms prescribed by law. And it is a familiar practice to institute proceedings of this nature, wherever a doubt occurs as to the rights of the parties who are entitled to share in the distribution. There is nothing in the circumstances of the present case to displace this jurisdiction. And it now appears that the proceeds, of which the distribution is now claimed, have been, by an express agreement between the United States and the collector, put in a situation to be forthcoming to meet the exigency of the decree which may be rendered upon the statement of facts.

The act of congress of the 29th of July, 1813, enacts "that the owners of the ships called The Good Friends, The Amazon, and The United States, and of the cargoes on board said vessels, which arrived in the month of April, 1812, in the district of Delaware, from Amelia Island, with cargoes that were shipped on board said vessels in the united kingdom of Great Britain and Ireland, shall be entitled to, and may avail themselves of all the benefits, privileges, and provisions of the act entitled, "an act directing the secretary of the treasury to remit fines, forfeitures, and penalties in certain cases, passed on the 2d day of January last past, in like manner and on the same conditions as though said vessels had departed from the kingdom aforesaid between the 23d day of June and the 15th day \* of September, mentioned in said act, and had arrived [ \* 425 ] within the United States after the 1st day of July last."

The act of the 2d of January, 1813, c. 149, [c. 7,]<sup>1</sup> enacts that in all cases where goods, wares, and merchandise, owned by a citizen or citizens of the United States, have been imported into the United States, from the united kingdom of Great Britain and Ireland, which

<sup>1</sup> 2 Stats. at Large, 789.

goods, &c., were shipped on board vessels which departed therefrom between the 23d day of June last and the 15th of September last, and the person or persons interested in such goods, &c., or concerned in the importation thereof, have thereby incurred any fine, penalty, or forfeiture, under an act, &c. &c., (reciting the titles of the non-intercourse acts of 1st of March, 1809,<sup>1</sup> and of 1st of May, 1810,<sup>2</sup> and of 2d of March, 1811,<sup>3</sup>) on such person or persons petitioning for relief to any judge or court proper to hear the same, in pursuance of the provision of the act entitled, "an act to provide for mitigating or remitting the fines, penalties, and forfeitures, in certain cases therein mentioned," and on the facts being shown, on inquiry had by said judge or court, &c.; in all such cases, wherein it shall be proved to his satisfaction that said goods, &c., at the time of their shipment, were *bona fide* owned by a citizen or citizens of the United States, and shipped, and did depart from some port or place in the united kingdom of Great Britain and Ireland, owned as aforesaid, between the 23d day of June last and the 15th day of September last, the secretary of the treasury is hereby directed to remit all fines, penalties, and forfeitures that may have been incurred under the said act, in consequence of such shipment, importation, or importations upon the costs and charges which have arisen, or may arise, being paid, and on payment of the duties which would have been payable by law on such goods, &c., if legally imported, &c. &c."

The result of both of these acts taken together, as applicable to the case of The Good Friends, is, that the secretary of the treasury was directed to remit the forfeiture, upon the payment of costs and charges, and the duties upon the cargo, which would have been payable upon the same goods, if legally imported, after the 1st of July, 1812, that is to say, upon payment of the double duties imposed by the act of the 1st of July, 1812, c. 112.<sup>4</sup> Without question, [ \* 426 ] these acts of congress were \*directory and mandatory to the secretary; and, in his remission, which forms a part of the case, he purports to act, and has in fact acted in obedience to their requirements.

It is wholly unnecessary to inquire whether the secretary would have had authority to remit the forfeiture in this case, under the Remission Act of the 3d of March, 1797, c. 67;<sup>5</sup> because, in the first place, the terms upon which the remission is to be granted by that act, essentially differ from those prescribed by these acts; and because, in the next place, the secretary purports to have acted in obedience to the latter.

<sup>1</sup> 2 Stats. at Large, 528.    <sup>2</sup> 2 Ib. 605.    <sup>3</sup> 2 Ib. 651.    <sup>4</sup> 2 Ib. 768.    <sup>5</sup> 1 Ib. 506.

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The question then arises, in what light the reservation and payment of the double duties, as conditions upon which the remission is granted, are to be considered? Are the double duties to be deemed a mere payment of lawful duties; or are they to be deemed a part of the forfeiture reserved out of the proceeds of the cargo? If the latter be the true construction, then the collector is entitled to a moiety; if the former, he is barred of all claim.

The duty of the collector in superintending the collection of the revenue, and in making seizures for supposed violations of law, is onerous and full of perplexity. If he seizes any goods, it is at his own peril; and he is condemnable in damages and costs, if it shall turn out, upon the final adjudication, that there was no probable cause for the seizure. As a just reward for his diligence, and a compensation for his risks; at once to stimulate his vigilance and secure his activity; the laws of the United States have awarded to him a large share of the proceeds of the forfeiture. But his right by the seizure is but inchoate; and, although the forfeiture may have been justly incurred, yet the government has reserved to itself the right to release it, either in whole or in part, until the proceeds have been actually received for distribution; and in that event, and to that extent, it displaces the right of the collector. Such was the decision of this court in the case of the *United States v. Morris*, 10 Wheat. 246. But whatever is reserved by the government out of the forfeiture, is reserved as well for the seizing officer, as for itself, and is distributable accordingly. The government has no authority, under the existing laws, to release the collector's share, as such, and yet to retain to itself the other part of the forfeiture.

\* In the present case, it is perfectly clear that the seizure [ \* 427 ] of *The Good Friends* and her cargo was justifiable, and that they were forfeited for a violation of the non-intercourse acts. This is established not only by the final decree of condemnation, but by the very terms of the remission granted by the secretary of the treasury. In point of law, no duties, as such, can legally accrue upon the importation of prohibited goods. They are not entitled to entry at the custom-house, or to be bonded.

They are, *ipso facto*, forfeited by the mere act of importation. The *Good Friends*, then, having arrived in April, 1812, long before the double duties were laid, and her cargo being prohibited from importation, it is impossible, in a legal sense, to sustain the argument, that the importation could be deemed innocent, and the government could be entitled to duties, as upon a lawful importation. It was entitled to the whole property, by way of forfeiture, and to nothing by way of duties. When, therefore, congress authorized the remission upon

the payment of double duties, the latter was imposed as a condition of restitution upon the offending party. In the language of the act of the 2d of January, 1813, the remission was to be "on payment of the duties which would have been payable by law on such goods, &c., if legally imported;" not upon payment of the duties which had lawfully accrued upon the same goods. The act presupposes that no duties had accrued or could accrue, by operation of law, upon the goods; and the act of the 29th of July, 1813, expressly treats it as a condition. Indeed, it is impossible that double duties could have lawfully accrued upon the importation of the cargo of The Good Friends, in April, 1812, when the double duties were not imposed until the passage of the act of the 1st of July of the same year.

If the government had reserved a gross sum, equivalent to the double duties, out of the forfeiture, as a condition of the remission, there could be no doubt that the collector would have been entitled to his moiety of the sum so reserved. Can it make any difference in point of law, that the reservation is made by a reference to double duties, as a mode of ascertaining that sum? It has not been pretended that the act of the 29th of July, 1813, could devest the rights of the collector,

antecedently vested in him by the existing laws. And [ \* 428 ] if such a \*doctrine could be maintained at all, it would still be necessary to establish that there was an unequivocal intention on the part of the government to remit his share, and to retain its own share of the forfeiture. Such an extraordinary exercise of power, if it could be even maintained, where it is subversive of existing rights, ought to be evidenced by terms susceptible of no doubt. We are of opinion that the present act neither justifies nor requires any such construction. The double duties are referred to as a mere mode of ascertaining the amount intended to be reserved out of the forfeiture; and not as a declaration of intention on the part of the government, that they were to be received as legal duties due upon a legal importation.

But a distinction has been taken at the argument on behalf of the United States, and an apportionment or division of the duties has been insisted on. It is said, that so much of the duties demanded as were equal to the single duties payable by law on imported goods, in April, 1812, ought to be considered as received in that character by the government; since this case has been treated by the government as an innocent importation. But as to the additional duties imposed by the act of 1st of July, 1812, they may be considered as a reservation of forfeiture. And it is added, that the government has itself acted upon this distinction in this very case; for it has allowed the collector his moiety of the latter, and denied it in respect to the former.

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v The true answer to be given to this argument is, that the act itself contemplates no such apportionment or division of the duties. The duties are reserved as a whole, and not in moieties. And it could not well be otherwise; for, as has been already shown, no duties at all were legally payable on the goods. They were in fact, and were treated by the government, as prohibited goods. And when the government imposed the double duties as a condition, they were imposed as a sum which would have accrued upon a legal importation after the 1st day of July, 1812. The very circumstance, that the government itself has treated any part of the reservation as forfeiture, and as distributable accordingly, is conclusive to show that the whole is incapable of being treated as duties. The distinction contended for, then, not "being found in the act itself, and part [ \*429 ] of it being confessedly received in the character of a forfeiture, we think the whole must be treated as received as a reservation by way of forfeiture. Our opinion is grounded upon the fact, that the act refers to the double duties as a mere mode of ascertaining the amount, and that it is undistinguishable from the case of a reservation of a gross sum.

Upon the whole, the decree of the circuit court refusing the distribution is to be reversed, and the cause remanded to that court, with directions to decree to the legal representatives of Allen M'Lane, the collector, one moiety of the double duties, deducting that portion which has been already received by him.

10 H. 109; 16 H. 369

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THE PRESIDENT, RECORDER, AND TRUSTEES OF THE CITY OF CINCINNATI, Plaintiffs in Error, v. THE LESSEE OF EDWARD WHITE, Defendant in Error.

6 P. 431.

If the owner of a tract of land dedicate it to the public use as an open square of a city, for the convenience and accommodation of the inhabitants, the public acquire a vested right to its possession for that use, and the owner or his representatives cannot maintain an action of ejectment to recover possession of it.

To constitute such a dedication the legal title need not pass from its owner, nor is it necessary that any grantee of the use should be in existence; all that is required is the assent of the owner of the land to the use, and the actual enjoyment of the use, for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment.

THE case is stated in the opinion of the court.

*Storer and Webster*, for the plaintiffs.

*Ewing and Clay*, for the defendants.

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[ \* 433 ] \* THOMPSON, J., delivered the opinion of the court.

The ejectionment in this case was brought by Edward White, who is also the defendant in error, to recover possession of a small lot of ground in the city of Cincinnati, lying in that part of the city usually denominated the Common. To a right understanding of the question upon which the opinion of the court rests, it will be sufficient to state generally, that on the 15th of October, in the year 1788, John Cleves Symmes entered into a contract with the then board of treasury, under the direction of congress, for the purchase of a large tract of land, then a wilderness, including that where the city of Cincinnati now stands. Some negotiations relative to the payments for the land delayed the consummation of the contract for several years. But on the 30th of September, 1794, a patent was issued conveying to Symmes and his associates the land contracted for; and as Symmes was the only person named in the patent, the fee was of course vested in him.

Before the issuing of the patent, however, and, as the witnesses say, in the year 1788, Mathias Denman purchased of Symmes a part of the tract included in the patent, and embracing the land whereon Cincinnati now stands. That in the same year, Denman sold one third of his purchase to Israel Ludlow, and one third to Robert Patterson. These three persons, Denman, Ludlow, and Patterson, being the equitable owners of the land, (no legal title having been granted,) proceeded in January, 1789, to lay out the town. A plan was made and approved of by all the proprietors, and according to which the ground lying between Front street and the river, and so located as to include the premises in question, was set apart as a common, for the use and benefit of the town forever, reserving only the right of a ferry; and no lots were laid out on the land thus dedicated as a common.

The lessor of the plaintiff made title to the premises in question under Mathias Denman, and produced in evidence a copy, duly authenticated, of the location of the fraction 17 from the books of John C. Symmes to Mathias Denman, as follows: "1791, April 4, Captain Israel Ludlow, in behalf of Mr. Mathias Denman, of New Jersey, presents for entry and location a warrant for one fraction of a section, or 107 $\frac{1}{2}$  of an acre of land, by virtue of which he

[ \* 434 ] \* locates the seventeenth fractional section in the fourth fractional township, east of the Great Miami River, in the first fractional range of townships on the Ohio River; number of the warrant 192." In March, 1795, Denman conveyed his interest, which was only an equitable interest, in the lands so located to Joel Williams; and on the 14th of February, 1800, John Cleves Symmes con-

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veyed to Joel Williams in fee, certain lands described in the deed which included the premises in question; and on the 16th of April, 1800, Joel Williams conveyed to John Daily the lot now in question. And the lessor of the plaintiff, by sundry mesne conveyances, deduces a title to the premises to himself.

In the course of the trial, several exceptions were taken to the ruling of the court, with respect to the evidence offered on the part of the plaintiff in making out his claim of title. But in the view which the court has taken of what may be considered the substantial merits of the case, it becomes unnecessary to notice those exceptions.

The merits of the case will properly arise upon one of the instructions given by the court, as asked by the plaintiff, and in refusing to give one of the instructions asked on the part of the defendant. At the request of the plaintiff, the court instructed the jury, "that to enable the city to hold this ground and defend themselves in this action by possession, they must show an unequivocal, uninterrupted possession for at least twenty years."

On the part of the defendants, the court was asked to instruct the jury, "that it was competent for the original proprietors of the town of Cincinnati to reserve and dedicate any part of said town to public uses, without granting the same by writing or deed to any particular person; by which reservation and dedication the whole estate of the said proprietors in said land, thus reserved and dedicated, became the property of and was vested in the public, for the purposes intended by the said proprietors; and that, by such dedication and reservation, the said original proprietors, and all persons claiming under them, are estopped from asserting any claim or right to the said land thus reserved and dedicated." The court refused to give the instruction as asked, but gave the following instruction:—

"That it was competent for the original proprietors of the town of Cincinnati to reserve and dedicate any part of [ \* 435 ] said town to public uses, without granting the same by writing or deed to any particular person; by which reservation and dedication the right of use to such part is vested in the public for the purposes designated; but that such reservation and dedication do not invest the public with the fee."

The ruling of the court to be collected from these instructions was, that although there might be a parol reservation and dedication to the public of the use of lands, yet such reservation and dedication did not invest the public with the fee; and that a possession and enjoyment of the use for less than twenty years, was not a defence in this action.

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The decision and direction of the circuit court upon those points, come up on a writ of error to this court.

It is proper, in the first place, to observe that, although the land which is in dispute, and a part of which is the lot now in question, has been spoken of by the witnesses as having been set apart by the proprietors as a common, we are not to understand the term as used by them in its strict legal sense; as being a right or profit which one man may have in the lands of another; but in its popular sense, as a piece of ground left open for common and public use, for the convenience and accommodation of the inhabitants of the town.

Dedications of land for public purposes have frequently come under the consideration of this court; and the objections which have generally been raised against their validity have been the want of a grantee competent to take the title; applying to them the rule which prevails in private grants, that there must be a grantee as well as a grantor. But that is not the light in which this court has considered such dedications for public use. The law applies to them rules adapted to the nature and circumstances of the case, and to carry into execution the intention and object of the grantor, and secure to the public the benefit held out, and expected to be derived from, and enjoyed by the dedication.

It was admitted at the bar, that dedications of land for charitable and religious purposes, and for public highways, were valid, without any grantee to whom the fee could be conveyed. Although such are

[ \* 436 ] the cases which most frequently occur and are to be found in the books, it is not perceived how any well-grounded

distinction can be made between such cases and the present. The same necessity exists in the one case as in the other, for the purpose of effecting the object intended. The principle, if well founded in the law, must have a general application to all appropriations and dedications for public use, where there is no grantee *in esse* to take the fee. But this forms an exception to the rule applicable to private grants, and grows out of the necessity of the case. In this class of cases there may be instances, contrary to the general rule, where the fee may remain in abeyance until there is a grantee capable of taking, where the object and purpose of the appropriation look to a future grantee in whom the fee is to vest. But the validity of the dedication does not depend on this; it will preclude the party making the appropriation from reasserting any right over the land, at all events so long as it remains in public use; although there may never arise any grantee capable of taking the fee.

The recent case of *Beatty v. Kurts*, 2 Pet. 566, in this court, is somewhat analogous to the present. There a lot of ground had been

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marked out upon the original plan of an addition to Georgetown, "for the Lutheran Church," and had been used as a place of burial from the time of the dedication. There was not, however, at the time of the appropriation, or at any time afterwards, any incorporated Lutheran Church capable of taking the donation.

The case turned upon the question, whether the title to the lot ever passed from Charles Beatty, so far as to amount to a perpetual appropriation of it to the use of the Lutheran Church. That was a parol dedication only, and designated on the plan of the town. The principal objection relied upon was, that there was no grantee capable of taking the grant. But the court sustained the donation, on the ground that it was a dedication of the lot to public and pious uses, adopting the principle that had been laid down in the case of the Town of Pawlet *v.* Clark, 9 Cranch, 292, that appropriations of this description were exceptions to the general rule requiring a grantee. That it was like a dedication of a highway to the public. This last remark shows that the case did not turn upon the bill of rights of Maryland, or the statute of Elizabeth relating to charitable uses, but rested upon more general \*principles, [ \* 437 ] as is evident from what fell from the court in the case of the Town of Pawlet *v.* Clark, which was a dedication to religious uses; yet the court said this was not a novel doctrine in the common law. In the familiar case where a man lays out a street or public highway over his land, there is, strictly speaking, no grantee of the easement, but it takes effect by way of grant or dedication to public uses. And in support of the principle, the case of Lade *v.* Shepherd, 2 Stra. 1004, was referred to, which was an action of trespass, and the place where the supposed trespass was committed was formerly the property of the plaintiff, who had laid out a street upon it, which had continued thereafter to be used as a public highway; and it was insisted, on the part of the defendant, that by the plaintiff's making a street, it was a dedication of it to the public, and that although he, the defendant, might be liable for a nuisance, the plaintiff could not sue him for a trespass. But the court said, it is certainly a dedication to the public, so far as the public has occasion for it, which is only for a right of passage, but it never was understood to be a transfer of his absolute property in the soil.

The doctrine necessarily growing out of that case, has a strong bearing upon the one now before the court, in two points of view. It shows, in the first place, that no deed or writing was necessary to constitute a valid dedication of the easement. All that was done, from any thing that appears in the case, was barely laying out the street by the owner, across his land. And, in the second place, that

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it is not necessary that the fee of the land should pass, in order to secure the easement to the public. And this must necessarily be so, from the nature of the case, in the dedication of all public highways. There is no grantee to take immediately, nor is any one contemplated by the party to take the fee at any future day. No grant or conveyance can be necessary to pass the fee out of the owner of the land, and let it remain in abeyance until a grantee shall come *in esse*; and indeed the case referred to in Strange, considers the fee as remaining in the original owner; otherwise he could sustain no action for a private injury to the soil, he having transferred to the public the actual possession.

If this is the doctrine of the law applicable to highways, it must apply with equal force, and in all its parts, to all dedications [ \*438.] of \*land to public uses; and it was so applied by this court to the reservation of a public spring of water for public use, in the case of M'Connell *v.* The Trustees of the Town of Lexington, 12 Wheat. 582. The court said, the reasonableness of reserving a public spring for public use, the concurrent opinion of all the settlers that it was so reserved, the universal admission of all that it was never understood that the spring lot was drawn by any person, and the early appropriation of it to public purposes, were decisive against the claim.

The right of the public to the use of the common in Cincinnati, must rest on the same principles as the right to the use of the streets; and no one will contend that the original owners, after having laid out streets, and sold building lots thereon, and improvements made, could claim the easement thus dedicated to the public.

All public dedications must be considered with reference to the use for which they are made; and streets in a town or city may require a more enlarged right over the use of the land, in order to carry into effect the purposes intended, than may be necessary in an appropriation for a highway in the country; but the principle, so far as respects the right of the original owner to disturb the use, must rest on the same ground in both cases; and applies equally to the dedication of the common as to the streets. It was for the public use and convenience and accommodation of the inhabitants of Cincinnati; and doubtless greatly enhanced the value of the private property adjoining this common, and thereby compensated the owners for the land thus thrown out as public grounds.

And after being thus set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an estoppel *in pais*, which precludes the original owner from revoking such dedication. It is a violation

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of good faith to the public, and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted.

The right of the public in such cases does not depend upon a twenty years' possession. Such a doctrine, applied to public highways and the streets of the numerous villages and cities that are so rapidly springing up in every part of our country, would be destructive of public convenience and private right.

\* The case of *Jarvis v. Dean*, 3 Bing. 447, shows that [ \*439 ] rights of this description do not rest upon length of possession. The plaintiff's right to recover in that case, turned upon the question whether a certain street in the parish of Islington had been dedicated to the public as a common public highway. Chief Justice Best, upon the trial, told the jury that if they thought the street had been used for years as a public thoroughfare, with the assent of the owner of the soil, they might presume a dedication ; and the jury found a verdict for the plaintiff, and the court refused to grant a new trial, but sanctioned the direction given to the jury, and the verdict found thereupon ; although this street had been used as a public road only four or five years ; the court saying, the jury were warranted in presuming it was used with the full assent of the owner of the soil. The point, therefore, upon which the establishment of the public street rested, was whether it had been used by the public as such, with the assent of the owner of the soil ; not whether such use had been for a length of time, which would give the right by force of the possession ; nor whether a grant might be presumed ; but whether it had been used with the assent of the owner of the land ; necessarily implying that the mere naked fee of the land remained in the owner of the soil, but that it became a public street, by his permission to have it used as such. Such use, however, ought to be for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment.

In the present case, the fact of dedication to public use is not left to inference, from the circumstance that the land has been enjoyed as a common for many years. But the actual appropriation for that purpose is established by the most positive and conclusive evidence. And indeed the testimony is such as would have warranted the jury in presuming a grant, if that had been necessary. And the fee might be considered in abeyance, until a competent grantee appeared to receive it ; which was as early as the year 1802, when the city was incorporated. And the common having then been taken under the charge and direction of the trustees, would be amply sufficient to

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show an acceptance, if that was necessary, for securing the protection of the public right.

[ \*440 ] \*But it has been argued that this appropriation was a nullity, because the proprietors, Denman, Ludlow, and Patterson, when they laid out the town of Cincinnati, and appropriated this ground as a common, in the year 1789, had no title to the land, as the patent to Symmes was not issued until the year 1794. It is undoubtedly true that no legal title had passed from the United States to Symmes. But the proprietors had purchased of Symmes all his equitable right to their part of the tract which he had under his contract with the government. This objection is more specious than solid, and does not draw after it the conclusions alleged at the bar.

There is no particular form or ceremony necessary in the dedication of land to public use. All that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation. This was the doctrine in the case of Jarvis and Dean, 3 Bing. 447, already referred to, with respect to a street; and the same rule must apply to all public dedications; and from the mere use of the land, as public land, thus appropriated, the assent of the owner may be presumed. In the present case, there having been an actual dedication fully proved, a continued assent will be presumed, until a dissent is shown; and this should be satisfactorily established by the party claiming against the dedication. In the case of Rex v. Lloyd, 1 Camp. 262, Lord Ellenborough says, if the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public.

At the time the plan of the town of Cincinnati was laid out by the proprietors, and the common dedicated to public use, no legal title had been granted. But as soon as Symmes became vested with the legal title, under the patent of 1794, the equitable right of the proprietors attached upon the legal estate, and Symmes became their trustee, having no interest in the land but the mere naked fee. And the assent of the proprietors to the dedication continuing, it has the same effect and operation as if it had originally been made after the patent issued. It may be considered a subsequent ratification and affirmation of the first appropriation. And it is very satis-

[ \*441 ] factorily proved, \*that Joel Williams, from whom the lessor of the plaintiff deduces his title, well understood, when he purchased of Denman, and for some years before, that this ground had been dedicated as a public common by the proprietors. The

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original plat, exhibiting this ground as a common, was delivered to him at the time of the purchase. And when he afterwards, in the year 1800, took a deed from Symmes, he must, according to the evidence in the case, have known that he was a mere trustee, holding only the naked fee. And from the notoriety of the fact, that these grounds were laid open and used as a common, it is fairly to be presumed, that all subsequent purchasers had full knowledge of the fact.

But it is contended that the lessor of the plaintiff has shown the legal title to the premises in question in himself, which is enough to entitle him to recover at law; and that the defendants' remedy, if any they have, is in a court of equity. And such was substantially the opinion of the circuit court, in the fourth instruction asked by the plaintiff, and given by the court, namely, "that if the said proprietors did appropriate said ground, having no title thereto, and afterwards acquired an equitable title only, that equitable title could not enure so as to vest a legal title in the city or citizens, and enable them to defend themselves in an action of ejectment brought against them by a person holding the legal title."

We do not accede to this doctrine. For should it be admitted, that the mere naked fee was in the lessor of the plaintiff, it by no means follows that he is entitled to recover possession of the common in an action of ejectment.

This is a possessory action, and the plaintiff, to entitle himself to recover, must have the right of possession; and whatever takes away this right of possession, will deprive him of the remedy by ejectment. Adams's *Eject.* 32; Starkie, part 4, 506, 507.

This is the rule laid down by Lord Mansfield in *Atkins v. Horde*, 1 Burr. 119. An ejectment, says he, is a possessory remedy, and only competent where the lessor of the plaintiff may enter; and every plaintiff in ejectment must show a right of possession as well as of property. And in the case of *Doe v. Staple*, 2 Durn. & East, 684, it was held, that although an outstanding satisfied term may be presumed to be surrendered, \*yet an unsatisfied term, [ \* 442 ] raised for the purpose of securing an annuity, cannot, during the life of the annuitant; and may be set up as a bar to the heir at law, even though he claim only subject to the charge. Thereby clearly showing the plaintiff must have, not only the legal title, but a clear present right to the possession of the premises; or he cannot recover in an action of ejectment. And in the case of *Doe v. Jackson*, 2 Dowl. & Ryl. 523, Bailey, Justice, says, "an action of ejectment, which from first to last is a fictitious remedy, is founded on the principle that the tenant in possession is a wrongdoer; and unless

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he is so at the time the action is brought, the plaintiff cannot recover."

If, then, it is indispensable that the lessor of the plaintiff should show a right of possession in himself, and that the defendants are wrongdoers, it is difficult to perceive on what grounds this action can be sustained.

The later authorities in England which have been referred to, leave it at least questionable, whether the doctrine of Lord Mansfield, in the case of *Goodtitle v. Alker*, (1 Burr. 143,) "that ejectment will lie by the owner of the soil for land, which is subject to a passage over it as the king's highway," would be sustained at the present day at Westminster Hall. It was not even at that day considered a settled point, for the counsel on the argument (page 140) referred to a case, said to have been decided by Lord Hardwicke, in which he held that no possession could be delivered of the soil of a highway, and therefore no ejectment would lie for it.

This doctrine of Lord Mansfield has crept into most of our elementary treatises on the action of ejectment, and has apparently, in some instances, been incidentally sanctioned by judges. But we are not aware of its having been adopted in any other case where it was the direct point in judgment. No such case was referred to on the argument, and none has fallen under our notice. There are, however, several cases in the supreme court of errors of Connecticut, where the contrary doctrine has been asserted and sustained by reasons much more satisfactory than those upon which the case in Burrow is made to rest. *Stiles v. Curtis*, 4 Day, 328; *Peck v. Smith*, 1 Con. 103.

But if we look at the action of ejectment on principle, [ \* 443 ] and "inquire what is its object, it cannot be sustained on any rational ground. It is to recover possession of the land in question; and the judgment, if carried into execution, must be followed by delivery of possession to the lessor of the plaintiff.

The purpose for which the action is brought, is not to try the mere abstract right to the soil, but to obtain actual possession; the very thing to which the plaintiff can have no exclusive or private right. This would be utterly inconsistent with the admitted public right. That right consists in the uninterrupted enjoyment of the possession. The two rights are therefore incompatible with each other, and can not stand together. The lessor of the plaintiff seeks specific relief, and to be put into the actual possession of the land. The very fruit of his action, therefore, if he avails himself of it, will subject him to an indictment for a nuisance; the private right of possession being in direct hostility with the easement, or use to which the public are entitled; and as to the plaintiff's taking possession subject to the

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easement, it is utterly impracticable. It is well said, by Mr. Justice Smith in the case of *Stiles v. Curtis*, 4 Day, 328, that the execution of a judgment in such case, involves as great an inconsistency as to issue an *habere facias possessionem* of certain premises to A, subject to the possession of B. It is said, cases may exist where this action ought to be sustained for the public benefit, as where erections are placed on the highway, obstructing the public use. But what benefit would result from this to the public? It would not remove the nuisance. The effect of a recovery would only be to substitute another offender against the public right, but would not abate the nuisance. That must be done by another proceeding.

It is said in the case in *Burrow*, that an ejectionment could be maintained because trespass would lie. But this certainly does not follow. The object and effect of the recoveries are entirely different. The one is to obtain possession of the land, which is inconsistent with the enjoyment of the public right; and the other is to recover damages merely, and not to interfere with the possession, which is in perfect harmony with the public right. So also, if the fee is supposed to remain in the original owner, cases may arise where perhaps waste or a special action on the case may be sustained for a private injury to such owner. But these are actions perfectly consistent with \* the public right. But a recovery in an action of [ \* 444 ] ejectionment, if carried into execution, is directly repugnant to the public right.

Upon the whole, the opinion of the court is, that the judgment must be reversed, and the cause sent back with directions to issue a *venire de novo*.

10 P. 682; 7 H. 185; 9 H. 10; 14 H. 268; 6 Wal. 458; 10 O. 582; 11 O. 499.

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### THE UNITED STATES v. JOHN D. QUINCY.

6 P. 445.

Under the 3d section of the act of April 20, 1818, (3 Stats. at Large, 448,) it is not necessary that the vessel should be armed, or in a condition to commit hostilities, on leaving the United States, in order to convict one indicted for being concerned in fitting out a vessel with intent that she should be employed, &c. It is sufficient if the defendant was knowingly concerned in fitting out or arming the vessel, with intent, &c., though that intent should appear to have been defeated after the vessel sailed.

But if the defendant had no fixed intention when the vessel sailed to employ her as a privateer, but only a wish so to employ her if he could obtain funds, on her arrival at a foreign port, for the purpose of arming her, then he is not guilty.

THE case is stated in the opinion of the court.

*Williams*, (district-attorney for Maryland,) for the United States.

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*Wirt, contra.*

[ \*462 ] \* THOMPSON, J., delivered the opinion of the court.

This case comes up from the circuit court of the United States for the Maryland district, on a division of opinion of the judges, upon certain instructions prayed for to the jury.

The indictment upon which the defendant was put upon his trial, contains a number of counts, to which the testimony did not apply, and which are not now drawn in question. The 12th and 13th are the only counts to which the evidence applied; and the offence charged in each of these is substantially the same; to wit, that the said John D. Quincy, on the 31st day of December, 1828, at the district of Maryland, &c., with force and arms, was knowingly concerned in the fitting out of a certain vessel called The Bolivar, otherwise called Las Damas Argentinas, with intent that such vessel should be employed in the service of a foreign people, that is to say,

in the service of the United Provinces of Rio de la Plata,

[ \*463 ] to commit \*hostilities against the subjects of a foreign prince; that is to say, against the subjects of his imperial majesty, the constitutional emperor and perpetual defender of Brazil, with whom the United States then were, and still are at peace, against the form of the act of congress in such case made and provided.

The act of congress under which the indictment was found, (6th vol. Laws U. S. 321, § 3,) declares, "that if any person shall, within the limits of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out, or arming of any ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace, &c., every person so offending, shall be deemed guilty of a high misdemeanor, and shall be fined not more than \$10,000, and imprisoned not more than three years, &c.

The testimony being closed, several prayers, both on the part of the United States and of the defendant, were presented to the court for their opinion and direction to the jury; and upon which the opinions of the judges were opposed, and which will now be noticed in the order in which they were made.

On the part of the defendant the court was requested to charge the jury, that if they believe that when The Bolivar left Baltimore, and

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when she arrived at St. Thomas, and during the voyage from Baltimore to St. Thomas, she was not armed, or at all prepared for war, or in a condition to commit hostilities, the verdict must be for the defendant.

The prayer on the part of the United States upon this part of the case, was, in substance, that if the jury find from the evidence that the defendant was, within the district of Maryland, knowingly concerned in the fitting out the privateer Bolivar, with intent that she should be employed in the manner alleged in the indictment, then the defendant was guilty of the offence charged against him, although the jury should find that the equipments of the said privateer were not complete within the United States, and that the cruise did not <sup>\*464</sup> actually commence until men were recruited, and [ \*464 ] further equipments were made at the island of St. Thomas in the West Indies.

The instruction which ought to be given to the jury under these prayers involves the construction of the act of congress, touching the extent to which the preparation of the vessel for cruising or committing hostilities must be carried before she leaves the limits of the United States, in order to bring the case within the act.

On the part of the defendant it is contended, that the vessel must be fitted out and armed, if not complete, so far at least as to be prepared for war, or in a condition to commit hostilities. We do not think this is the true construction of the act. It has been argued that although the offence created by the act is a misdemeanor, and there cannot, legally speaking, be principal and accessory, yet the act evidently contemplates two distinct classes of offenders. The principal actors who are directly engaged in preparing the vessel, and another class who, though not the chief actors, are in some way concerned in the preparation.

The act in this respect may not be drawn with very great perspicuity. But should the view taken of it by the defendant's counsel be deemed correct (which, however, we do not admit,) it is not perceived how it can affect the present case. For the indictment, according to this construction, places the defendant in the secondary class of offenders. He is only charged with being knowingly concerned in the fitting out the vessel, with intent that she should be employed, &c. To bring him within the words of the act, it is not necessary to charge him with being concerned in fitting out and arming. The words of the act are, fitting out or arming. Either will constitute the offence. But it is said such fitting out must be of a vessel armed, and in a condition to commit hostilities, otherwise the minor actor may be guilty when the greater would not. For as

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The act in this respect may not be drawn with very great perspicuity. But should the view taken of it by the defendant's counsel be deemed correct (which, however, we do not admit,) it is not perceived how it can affect the present case. For the indictment, according to this construction, places the defendant in the secondary class of offenders. He is only charged with being knowingly concerned in the fitting out the vessel, with intent that she should be employed, &c. To bring him within the words of the act, it is not necessary to charge him with being concerned in fitting out and arming. The words of the act are, fitting out or arming. Either will constitute the offence. But it is said such fitting out must be of a vessel armed, and in a condition to commit hostilities, otherwise the minor actor may be guilty when the greater would not. For as

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to the latter there must be a fitting out and arming in order to bring him within the law. If this construction of the act be well founded, the indictment ought to charge that the defendant was concerned in fitting out The Bolivar, being a vessel fitted out and armed, &c. But this, we apprehend, is not required. It would be going [ \* 465 ] beyond \*the plain meaning of the words used in defining the offence. It is sufficient if the indictment charges the offence in the words of the act; and it cannot be necessary to prove what is not charged. It is true, that with respect to those who have been denominated at the bar the chief actors, the law would seem to make it necessary that they should be charged with fitting out and arming. These words may require that both should concur; and the vessel be put in a condition to commit hostilities, in order to bring her within the law. But an attempt to fit out and arm is made an offence. This is certainly doing something short of a complete fitting out and arming. To attempt to do an act does not, either in law or in common parlance, imply a completion of the act, or any definite progress towards it. Any effort or endeavor to effect it will satisfy the terms of the law.

This varied phraseology in the law, was probably employed with a view to embrace all persons of every description who might be engaged, directly or indirectly, in preparing vessels with intent that they should be employed in committing hostilities against any powers with whom the United States were at peace. Different degrees of criminality will necessarily attach to persons thus engaged. Hence the great latitude given to the courts in affixing the punishment, namely, a fine not more than \$10,000, and imprisonment not more than three years.

We are accordingly of opinion, that it is not necessary that the jury should believe or find that The Bolivar, when she left Baltimore, and when she arrived at St. Thomas, and during the voyage from Baltimore to St. Thomas, was armed, or in a condition to commit hostilities, in order to find the defendant guilty of the offence charged in the indictment.

The first instruction, therefore, prayed on the part of the defendant must be denied, and that on the part of the United States given.

The second and third instructions asked on the part of the defendant, were:—

That if the jury believe, that when The Bolivar was fitted and equipped at Baltimore, the owner and equipper intended to go to the

[ \* 466 ] West Indies in search of funds, with which to arm and equip the said vessel, and had no present intention \*of using or employing the said vessel as a privateer, but in-

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tended, when he equipped her, to go to the West Indies, to endeavor to raise funds to prepare her for a cruise; then the defendant is not guilty.

Or, if the jury believe, that when The Bolivar was equipped at Baltimore, and when she left the United States, the equipper had no fixed intention to employ her as a privateer, but had a wish so to employ her, the fulfilment of which wish depended on his ability to obtain funds in the West Indies, for the purpose of arming and preparing her for war; then the defendant is not guilty.

We think these instructions ought to be given. The offence consists principally in the intention with which the preparations were made. These preparations, according to the very terms of the act, must be made within the limits of the United States; and it is equally necessary that the intention with respect to the employment of the vessel should be formed before she leaves the United States. And this must be a fixed intention; not conditional or contingent, depending on some future arrangements. This intention is a question belonging exclusively to the jury to decide. It is the material point on which the legality or criminality of the act must turn; and decides, whether the adventure is of a commercial or warlike character.

The law does not prohibit armed vessels belonging to citizens of the United States from sailing out of our ports; it only requires the owners to give security (as was done in the present case) that such vessels shall not be employed by them to commit hostilities against foreign powers at peace with the United States.

The collectors are not authorized to detain vessels, although manifestly built for warlike purposes, and about to depart from the United States, unless circumstances shall render it probable, that such vessels are intended to be employed by the owners to commit hostilities against some foreign power, at peace with the United States.

All the latitude, therefore, necessary for commercial purposes, is given to our citizens; and they are restrained only from such acts as are calculated to involve the country in war.

The second and third instructions asked on the part of the \* United States ought also to be given. For if the [ \* 467 ] jury shall find (as the instructions assume) that the defendant was knowingly concerned in fitting out The Bolivar within the United States, with the intent that she should be employed as set forth in the indictment, that intention being defeated by what might afterwards take place in the West Indies, would not purge the offence which was previously consummated. It is not necessary that the design or intention should be carried into execution in order to constitute the offence.

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The last instruction or opinion asked on the part of the defendant was :—

That according to the evidence in the cause, the United Provinces of Rio de la Plata is, and was at the time of the offence alleged in the indictment, a government acknowledged by the United States, and thus was a State and not a people, within the meaning of the act of congress under which the defendant is indicted; the word people in that act being intended to describe communities under an existing government not recognized by the United States; and that the indictment, therefore, cannot be supported on this evidence.

The indictment charges that the defendant was concerned in fitting out The Bolivar, with intent that she should be employed in the service of a foreign people; that is to say, in the service of the United Provinces of Rio de la Plata. It was in evidence, that the United Provinces of Rio de la Plata had been regularly acknowledged as an independent nation by the executive department of the government of the United States, before the year 1827. And therefore it is argued that the word people is not properly applicable to that nation or power.

The objection is one purely technical, and we think not well founded. The word people, as here used, is merely descriptive of the power in whose service the vessel was intended to be employed; and it is one of the denominations applied by the act of congress to a foreign power. The words are, "in the service of any foreign prince or state, or of any colony, district, or people." The application of the word people is rendered sufficiently certain by what follows under the *videlicet*, "that is to say, the United Provinces of

Rio de la Plata." This particularizes that which by the [ \* 468 ] word people \* is left too general. The descriptions are in no way repugnant or inconsistent with each other, and may well stand together. That which comes under the *videlicet* only serves to explain what is doubtful and obscure in the word people.

This instruction must therefore be denied, and the one asked on the part of the United States, viz : that the indictment is sufficient in law, must be given.

These answers must accordingly be certified to the circuit court.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Maryland, and on the points and questions on which the judges of the said circuit court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the act of congress in such

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case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court,

1. That it is not necessary that the jury should believe or find that The Bolivar, when she left Baltimore, and when she arrived at St. Thomas, and during the voyage from Baltimore to St. Thomas, was armed, or in a condition to commit hostilities, in order to find the defendant guilty of the offence charged in the indictment. Therefore, the first instruction prayed for on the part of the defendant must be denied, and that on the part of the United States given.

2. That the second and third instructions asked for on the part of the defendant should be given.

3. That the second and third instructions asked for on the part of the United States should also be given.

4. That the fourth instruction asked for on the part of the defendant must be denied, and the one asked on the part of the United States, viz: that the indictment is sufficient at law, must be given.

8 P. 44; 9 H. 451.

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**THE UNITED STATES, Appellant, v. JOSEPH NOURSE, Complainant.**

6 P. 470.

No appeal is given to the United States from a decree of a district judge awarding an injunction to stay a warrant of distress from the treasury, either by the act of May 15, 1820, (3 Stats. at Large, 592,) which confers the jurisdiction, or by the act of March 3, 1803, (2 Stats. at Large, 244,) regulating appeals from final judgments and decrees in district courts.

The second section of this act of 1803 made no change in the law respecting appeals from district to circuit courts, except by reducing the matter in controversy necessary for an appeal from \$300 to \$50. But it substitutes an appeal for a writ of error, from the circuit to the supreme court, in admiralty, prize, and equity causes.

If a circuit court entertain an appeal from a district court without jurisdiction, this court, on appeal, will reverse the decree of the circuit court.

**The case is stated in the opinion of the court.**

**Coxe and Sergeant, for the appellees.**

**Swann and Taney, (attorney-general,) contra.**

**M'LEAN, J., delivered the opinion of the court.**

\* A motion is made by the counsel for the defendant, the [ \*490 ] appellee, to dismiss this suit for want of jurisdiction.

The proceedings in this case were instituted by the government, under an act of congress "providing for the better organization of the treasury department," passed the 15th of May, 1820.

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By the 2d section of this act it is provided, "that from and after the 30th day of September next, if any collector of the revenue, receiver of public money, or other officer, who shall have received the public money before it is paid into the treasury of the United States, shall fail to render his account or pay over the same, in the manner or within the time required by law, it shall be the duty of the first comptroller of the treasury to cause to be stated the account of such collector, receiver of public money, or other officer, exhibiting truly the amount due to the United States, and certify the same to the agent of the treasury, who is hereby authorized and required to issue a warrant of distress against such delinquent officer and his sureties, directed to the marshal, &c., who is authorized to collect the sum remaining due by distress and sale of the goods and chattels of such delinquent officer, on ten days' notice, &c.; and if the goods and chattels be not sufficient to satisfy the said warrant, the same may be levied upon the person of such officer, who may be committed to prison, there to remain until discharged by due course of law."

The 4th section provides, that if any person should consider himself aggrieved by any warrant issued under this act, he may prefer a bill of complaint to any district judge of the United States, setting forth therein the nature and extent of the injury of which he complains; and thereupon the judge aforesaid may, if in his opinion the case requires it, grant an injunction to stay proceedings on such warrant altogether, or for so much thereof as the nature of the case requires; but no injunction shall issue until the party applying for the same shall give bond and sufficient security, conditioned for the performance of such judgment as shall be awarded against the complainant, in such amount as the judge granting the injunction shall prescribe; nor shall the issuing of such injunction in any manner

impair the lien produced by the issuing of such warrant.

[ \* 491 ] And the same proceedings shall be had on such \* injunction as in other cases, except that no answer shall be necessary on the part of the United States; and if upon dissolving the injunction, it shall appear to the satisfaction of the judge who shall decide upon the same, that the application for the injunction was merely for delay, in addition to the lawful interest, the judge is authorized to add such damages, as, with the interest, shall not exceed the rate of ten per cent. per annum upon the principal sum."

The 5th section provides, that such injunctions may be granted or dissolved by such judge, either in or out of court.

And in the 9th section, "that if any person shall consider himself aggrieved by the decision of such judge, either in refusing to issue the injunction, or, if granted, on its dissolution, it shall be compe-

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tent for such person to lay a copy of the proceedings had before the district judge, before a judge of the supreme court, to whom authority is given either to grant an injunction or permit an appeal, as the case may be, if, in the opinion of such judge of the supreme court, the equity of the case requires it; and thereupon the same proceedings shall be had upon such injunction in the circuit court as are prescribed in the district court, and subject to the same conditions in all respects whatsoever."

Under these provisions, a warrant of distress was issued against the defendant, as late register of the treasury of the United States, for the sum of \$11,769.13, which was alleged to be a balance found against him in favor of the United States, on a final settlement of his accounts.

On presenting his bill to the district judge, setting forth that he was not indebted to the United States, the defendant obtained the allowance of an injunction, and it was issued on his giving the requisite security.

On the 2d of January, 1830, although not required, the attorney of the United States filed an answer to the bill, and, by consent, the cause came on to be heard; when, on motion, the injunction was dissolved, and it was agreed that if the cause should be appealed to the circuit court, that a general replication might be filed, and either party have liberty to take and file such testimony as might have been taken in the district court.

\*Afterwards, in September, 1830, it was agreed between [ \*492 ] the parties, that "the order for the dissolution of the injunction, and the decree dismissing the bill, having been made under a misapprehension that the evidence might be taken in the circuit court upon the appeal, should be set aside, and the cause be reinstated upon the docket of the district court at the next term, and that it should be set for hearing at that term, and that testimony should be taken," &c.

In pursuance of this agreement, the cause was docketed in the district court, and on the 20th of December, 1830, the accounts exhibited by both parties were referred, by the court, to auditors, who, on the 4th of January, 1831, reported that the defendant, for certain specified services, which he had rendered the United States, and for which he had received no compensation, was justly entitled to the sum of \$23,582.72. This report having been duly considered by the court, was "confirmed and made absolute," and the injunction was decreed to be perpetual.

From this decree an appeal was taken by the government to the circuit court.

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And afterwards, the following decree was made in that court: "whereupon, the record and proceedings aforesaid, with the abstracts and accounts, and all things thereto relating, having been read and fully understood; and after argument of counsel, and mature deliberation thereon had by the court here, for that it appears to the said court that there is no error in the decree in the record and proceedings aforesaid, nor in the giving of the said decree; therefore, it is considered by the court here, that the said decree, given in form aforesaid, be in all things affirmed, and stand in full force and effect."

From this decree an appeal was taken by the government to this court, and the dismissal of this appeal is the object of the present motion.

The summary proceedings, authorized by the recited act, were designed to secure the interests of the government in cases where the ordinary process of law would be inadequate. To provide for such emergencies, the treasury department is vested with extraordinary and responsible powers; and to guard the rights of the citizens [ \* 493 ] from any abuse by the exercise \* of these powers, a special authority is given to a district judge of the United States, or one of the judges of this court, to arrest the proceedings by granting an injunction.

The judge who allows the injunction, may extend it to the whole or a part of the demand of the government, as the equity of the case may require. He may grant such injunction or dissolve it, either in or out of court. As the proceedings on this injunction, in regard to the merits of the case, are to be the same as in other cases of injunction, and may be had before the judge, out of court, and as the district court possesses no chancery powers, the jurisdiction given by this act must be limited by it.

If the party be aggrieved, either by the refusal of the judge to grant the injunction, or by his dissolving it, an appeal may be allowed to the circuit court, by a judge of the supreme court. As this special mode is pointed out, by which an appeal from the decision of the district judge to the circuit court may be taken, it negatives the right to an appeal in any other manner.

Whilst congress seemed disposed to protect the citizen from oppression by the exercise of the extraordinary powers vested in the government under the act of 1820, they were not willing that the proceedings should be arrested, except upon equitable ground. No provision is made in the act for an appeal by the government; but it is insisted that this right is secured by the general provisions of the act of 1803.

By the 2d section of this act, it is provided, "that from all

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final judgments or decrees in any of the district courts of the United States, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of fifty dollars, shall be allowed."

This act authorizes an appeal from a decree or judgment of the district court, rendered in the ordinary exercise of its jurisdiction, which is limited to cases at law, and of admiralty and maritime jurisdiction. It may be admitted, that an enlargement of the powers of the district court, by giving a new remedy, would not require a special provision to secure the right of appeal; but if a new jurisdiction be conferred, and a special mode be provided, by which it shall be exercised, it is <sup>\*</sup>clear that the remedy can- [ \* 494 ] not be extended beyond the provisions of the act.

If provision had not been made in the act, allowing an appeal to the aggrieved party, under the sanction of a judge of the supreme court, he could take no appeal from the decision of the district judge. And as there is no provision in the act authorizing an appeal by the government, is it not equally clear that it can take no appeal?

In judicial proceedings, no exclusive rights are given to the government in this respect over other suitors, except by statutory provisions. From a decision of the district judge, out of court, how could the government appeal to the circuit court. It is no answer to this question, that the decree under consideration was made by the district judge in court. The right to an appeal cannot depend upon this contingency, and the objection to the appeal in one case is as strong as in the other.

The government consents to have the summary proceedings instituted by its officers arrested on certain conditions, and gives a right to the aggrieved party to carry his complaint to the circuit court, but no appeal is provided for, or seems to be contemplated, in behalf of the government. Having submitted itself to the special jurisdiction created by the act, it is as much bound by the decision of the judge as an individual, and can claim no exemption from the decision, by appeal or otherwise, which does not belong equally to the other party, independent of any special provision.

Having the power to collect, in this summary mode, the sum due from an individual, as established by the books of the treasury, the legislature may have considered that the interest of the government would be safe in the hands of the judge to whom the special jurisdiction is given.

It is objected that, in the consideration of this motion to dismiss the appeal for want of jurisdiction, the court cannot look beyond the decree which was made in the circuit court. And that, as that court

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apparently had jurisdiction, this being a chancery proceeding, its jurisdiction can only be questioned, if at all, on the final hearing.

In the discussion of the motion, the jurisdiction of the circuit court has been fully investigated on both sides; and the [ \* 495 ] \* question must be considered as much before the court as it could be on the final hearing. This being a case in chancery, a motion to dismiss for want of jurisdiction may involve all objections to the jurisdiction which may be urged without a consideration of the merits of the case.

If it clearly appear that the circuit court had no jurisdiction in this case, still, this court may take jurisdiction, so far as it regards the proceedings had before the circuit court; but those proceedings, being wholly unauthorized, must be annulled or reversed. This court, however, in such case, can take no further jurisdiction of the cause. They cannot remand the cause for further proceedings to the circuit court, because that court has no jurisdiction; and they cannot retain the cause here for further proceedings, because this court can exercise no appellate jurisdiction which is not given to it by statute.

Upon a deliberate consideration of the case, the court are clearly of the opinion that the special jurisdiction created by the act of 1820, must be strictly exercised within its provisions. A particular mode is provided, by which an appeal from the decision of the district judge may be taken; consequently, it can be taken in no other way. No provision is made for an appeal by the government, of course none was intended to be given to it.

There is another point of view in which this case may be considered, and which is equally conclusive against the jurisdiction of this court. The jurisdiction of the district court is limited to cases at law, and of admiralty and maritime jurisdiction. From all decrees over a certain amount, in the latter, appeals may be taken to the circuit court; but judgments of law must be removed by writ of error.

In the case of the *United States v. Goodwin*, reported in 7 Cranch, 108, this court decided that no writ of error lies to reverse the decision of a circuit court in a civil action which had been brought to that court from the district court by writ of error. This decision was made under the provision of the 22d section of the Judiciary Act of 1789,<sup>1</sup> which subjects no cause to revision in the supreme court by writ of error that was brought from the district to the circuit court, in any other way than by appeal. And as no cause, except of ad-

[ \* 496 ] \* m  
alty and maritime jurisdiction, could be so appealed, it followed, under that act, that such cases only, coming from

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<sup>1</sup> 1 Stats. at Large, 84.

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the district to the circuit court, could be taken to the supreme court on a writ of error.

The act of 1803, which provides that, "from all final judgments or decrees in any of the district courts, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of \$50, shall be allowed to the circuit court," made no alterations in the law of 1789, as it respects appeals to the circuit court, except in reducing the sum or matter in controversy from \$300 to \$50, on which such appeals shall be allowed. The above provision had no reference to a chancery proceeding, as the district court is not vested with chancery powers, and the words, "final judgments or decrees," refer to judgments and decrees in cases of admiralty and maritime jurisdiction. It therefore follows, that in such cases only has the law authorized an appeal from the district to the circuit court.

In the 2d section of the act of 1803, it is also provided, "that from all final judgments or decrees rendered, or to be rendered, in any circuit court, in any cases of equity, of admiralty, and maritime jurisdiction, and of prize or no prize, an appeal where the matter in dispute, exclusive of costs, shall exceed the sum or value of \$2,000, shall be allowed to the supreme court." This provision so far modifies the 22d section of the act of 1789, as to allow appeals to be taken from the judgments or decrees of the circuit court in cases of admiralty and maritime jurisdiction, though such causes may have been brought to the circuit court by an appeal from the district court. An appeal is substituted by this act instead of a writ of error, to remove such causes from the circuit to the supreme court.

It might have been contended in the case of the *United States v. Goodwin*, 7 Cranch, 108, as it has been argued in this case, that as the supreme court had power to revise the judgments of the circuit court, they could not dismiss the writ of error, in that case, for want of jurisdiction. But they decided that their jurisdiction was limited to the provisions of the statute, and that as it contained no provision for the revision in the supreme court, by writ of error, of any judgment or decree of the circuit court, in a cause which had been brought to that court \* from the district court, except [ \* 497 ] by appeal, they could not sustain the writ of error.

If, then, it appears that no provision is made in the general act to authorize an appeal from the judgment or decree of the district court to the circuit court, except in cases of admiralty or maritime jurisdiction; is it not clear, on the principle of the case of the *United States v. Goodwin*, that the appeal cannot be sustained in this case.

If it be a case in chancery, as denominated by the counsel for the government, no provision is made in the general law for the appeal of such a case from the district to the circuit court.

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Whether we look to the general law which regulates appeals, or to the provisions of the act of 1820, which confers the special jurisdiction that was exercised in this case; the want of jurisdiction in the circuit court is equally clear.

The decree of the circuit court must be reversed.

9 P. 8; 11 P. 162; 14 P. 614; 1 B. 483; 7 Wal. 364.

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**JOSEPH BARCLAY, FLORENCE COLTER, and JOHN M. SNOWDEN, Plaintiffs in Error, v. RICHARD W. HOWELL'S LESSEE.**

6 P. 498.

A general description of a lot, as lying between a certain street and a river, is sufficient in ejectment.

Declarations of an agent employed to lay out a town, and return a plan afterwards acted on by his principal, made while engaged in the work, to the effect that a certain strip of ground was reserved for a street, are admissible to prove a dedication of the land to that use.

Though land is not in a condition to be presently used as a street, and has never been so used; yet, if capable of being so used, it may have been dedicated.

Though non-user is important evidence upon the question of dedication, it is not conclusive. Where a part of a strip of land adjoining a river had been used as a way, and the residue was not in a condition to be so used without grading, &c., and the public authorities had from time to time improved more and more of it, and the proprietors had made no claim for thirty years, and their agent declared, when the town was laid out that it was reserved for a street. *Held*, that the jury would be warranted in finding a dedication of the whole strip, and if so dedicated the proprietor could not recover.

A deed called for a lot designated on a town plat as No. 183, bounded by a street and a river. *Held*, that if the jury were satisfied that the call for the river was a mistake, it might be rejected.

THE case is stated in the opinion of the court.

*Wilkins*, for the plaintiffs.

*Sergeant*, contra.

[ \*500 ] \*MCLEAN, J., delivered the opinion of the court.

This suit was brought in the western district of Pennsylvania, to recover a lot of ground in the city of Pittsburgh, described in the declaration as lying between Water street and the River Monongahela. As the district judge could not sit in the cause, it was certified to the eastern district, under the act of congress.

The defendants in the court below appeared in behalf of the city and defended the action, on the ground that the entire slip of land between the north line of Water street and the river, was dedicated, at the time the town was laid out, as a street or right of way to the public.

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The lessor of the plaintiff exhibited legal conveyances for the lot in controversy.

At the trial, various exceptions were taken to the ruling of the court, in the rejection of evidence offered by the defendants, and also to the charge of the court to the jury. These exceptions are brought before this court for consideration, by a writ of error.

The first assignment of error is, in substance, that the verdict being general, is void for want of certainty. That the finding of the jury did not settle the matter in controversy, and by consequence did not authorize the judgment.

This must be considered as an exception to the sufficiency of the declaration; as any other matter embraced by it might have been considered on a motion for a new trial, but cannot now be noticed.

The description of the lot in the declaration is general, as lying between Water street and the river; but no doubt is entertained \* that this is a sufficient description. Formerly, it [ \*501 ] was necessary, to describe the premises for which an action of ejectment was brought with great accuracy; but far less certainty is requisite in modern practice. All the authorities say that a general description is good. The lessor of the plaintiff, on a lease for a specific number of acres, may recover any quantity of less amount.

The rejection of the evidence contained in the depositions of Samuel Ewalt and John Finley, is the second error assigned.

To understand the force of this exception, it will be necessary to advert to a succinct history of the case.

There was vested in the Penn family a tract of land consisting of between five and six thousand acres that included the village of Pittsburgh, which at that time consisted of a small number of settlers, very few, if any of whom, had a title to the lots they occupied. This tract was denominated a manor, as was the practice at that time to call large tracts of land, which had been surveyed within the charter of the original proprietor of Pennsylvania. Being desirous of laying out a town at Pittsburgh, Tench Francis, who acted as the attorney of John Penn, Jr., and John Penn, addressed the following letter to George Woods, Esq.

Philadelphia, 29th April, 1784.

SIR: By directions of Messrs. Penns, I take the liberty to request you to undertake the laying out of the town of Pittsburgh, and dividing all the other parts of the manor into proper lots and farms, and to set a value on each, supposing them clear of any kind of incumbrances, in doing of which, be pleased to make the proper inquiries, and ascertain the previous claims, pretended or not, of the present settlers, and all others set up. The whole of the manor being

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intended for immediate sale, I wish you would point out the best method to effect it; and, if agreeable to you to transact this business, inform me on what terms you will do it. All expenses, and your charges for making the above survey, I will pay, &c.

In the month of May or June, of the same year, Woods laid out the town of Pittsburgh, and also surveyed into out lots and small plantations, the residue of the manor; and made return to his principal [ \*502 ] copy of a copy of the town plat and the other surveys.

This return, and the whole proceedings of Woods, were sanctioned by the following letter:—

Philadelphia, 30th September, 1784.

DEAR SIR: As attorney to John Penn, Jr., and John Penn, Esqs., late proprietors of Pennsylvania, I hereby approve of the plan you have made of the town of Pittsburgh, and now confirm the same, together with the division of the out lots and the other part of the manor of Pittsburgh. The several appliers, agreeable to your list furnished me, may depend on having deeds for their lots and plantations, whenever they pay the whole of the purchase-money, &c.

George Woods, Esq.

TENCH FRANCIS.

The original plat of the town of Pittsburgh, which was made by Woods, was given in evidence to the jury, from which it appears that the town was laid out into lots, streets, and alleys, from the junction of the Alleghany and Monongahela rivers, extending up the latter to Grant street. With the exception of Water street, which lies along the bank of the Monongahela, all the streets and alleys of the town were distinctly marked by the surveyor, and their width laid down. Near the junction of the rivers, the space between the southern line of the lots and Monongahela River is narrow, but it widens as the lots extend up the river.

It was contended by the defendants in the ejectment, that the before described slip of land was dedicated by the surveyor when he laid out the town, to the public as a street, or for other public uses. As the lot for which the ejectment was brought is situated in this narrow strip of land, the fact of dedication becomes material.

From the plan of the town, it does not appear that any artificial boundary, as the southern limit of Water street, was laid down. The name of the street is given, and its northern boundary; but the space to the south is left open to the river. All the streets leading south, terminate at Water street; and no indication is given in the plat, or in any part of the return of the surveyor, that Water street did not extend to the river, as it appears to do by the face of the plat.

The depositions of Ewalt and Finley were offered by the defend-

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ants, to prove the declarations of Woods at the time the \* survey of the town was made. Ewalt stated that the [ \* 503 ] survey was about to be commenced at a point which would have required him to remove his house, and that at his instance the place of beginning was changed. On a remonstrance being made by several persons who had assembled, that Water street would be too narrow, Mr. Woods observed to the party, "these houses will not remain or stand very long; you will build new houses and dig cellars, and bank out Water street as wide, till it comes to low-water mark, if you please." He observed, "that this street, to low-water mark, should be for the use of the citizens and the public forever."

Finley states that Woods declared to the people of the town that he would not change the old military plan; but that "Water street should be left open to the river's edge, at low-water mark, for the use of said town; that they, the citizens, might use the same as landings, build walls, make wharves, or plant trees at their pleasure."

Several objections are made to the competency of this testimony.

It is insisted that the declarations of Woods, respecting the ground in controversy, did not come within the scope of his authority; and if they did, still, that they ought not to be received in evidence.

Woods had authority to fix upon the plan of the town and survey it. He had the power to determine the width of the respective streets and alleys, the size and form of the lots, to mark out the public grounds, and to determine on every thing so far as related to the town, which would add to its beauty, convenience, and value. These were clearly within the scope of his powers, as they were essentially connected with the plan of the town, on which he was authorized to determine at his discretion.

But it is said that his acts, until sanctioned, were not binding upon his principal; and that as his principal was not present, his sanction, which was subsequently given, cannot be extended beyond what appears upon the town plat, which was returned by the agent.

The sanction, when given, related back to the original transaction; and gave equal effect to it, as if the principal had been present. So far as valuations had been made of the lots occupied by \* persons who had no titles, and who were to obtain titles [ \* 504 ] on paying the prices fixed by Woods, it is very clear that the principal could not be bound by the act of confirmation, beyond what appeared upon the face of the return; nor, if the agent had attempted, by any covert means, to give to the citizens of the town ground which he did not designate on his return, and which did not tend, directly, to increase the value of the town lots. But if the ground dedicated for a street or any other public use, was essentially con-

nected with the town lots, and must have enhanced their value at the sale, the increased value thus realized, and a long acquiescence, would estop the original owner of the fee from asserting his claim, though the ground dedicated had not been so designated on the map.

There is nothing, however, on the plat which shows any limits to the width of Water street, short of the river on the south. If a line had been drawn along its southern limit, there would have been great force in the argument that the ground between such limit and the water was reserved by the proprietors. This would have been the legal consequence from such a survey, unless the contrary had been shown.

It must be admitted that the declarations of an agent respecting things done within the scope of his authority, are not evidence to charge his principal, unless they were made at the time the act was done, and formed a part of the transaction. The declarations referred to were a part of the *res gesta*; they were explanatory of the act then being done; and they do not, as was contended, contradict the return, but tend to explain and confirm it.

The southern limit of Water street was the point of inquiry before the jury. It was a question of boundary, and governed by the same rules of evidence which are of daily application in such a case. In this view, were not the declarations of the person who fixed the boundary legal evidence? Not declarations casually made at a different time from that at which the survey was executed, but at the very time the act was done. The proof of such declarations should have been admitted by the circuit court; because, under the circumstances, they formed a part of the transaction.

The declarations of a surveyor which contradict his official [ \* 505 ] return, are clearly not evidence; nor ought they to be received where he has no power to exercise a discretion as explanatory of his return, while he is still living, and may be examined as a witness.

The exception taken to the rejection of Coates's deposition is abandoned.

Several exceptions were made to the charge of the court to the jury.

1. "In saying that the property in question passed to Wilson, unless the jury should decide that the whole ground to the river was not only dedicated as a street, but that it must be capable of being used as such; that it was used as a highway or street, and that the slip of land, if it was not wholly given to the public as a street, or so much of it as was not so given, vested in the proprietors, as the undisputed owners of it."

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As the fee to this property was vested in the Penn family at the time the town was laid out, it is a clear proposition that such parts of the land as were not conveyed to the purchasers, or dedicated to the public, remained in the proprietors. But that part of the charge which instructed the jury that it must appear that the ground to the river was not only capable of being used as a street, but had been so used, is conceived to be erroneous.

From the evidence in the cause, it appears that the northern bank of the Monongahela, from its junction with the Alleghany, to the extent of the town plat, still remains elevated in many places; but several of the streets leading south have been extended to the river, and they have been so graduated as to admit of an easy approach to the water.

When complaint was made to Woods that Water street would be too narrow, he observed, that its width might be artificially extended for the convenience of the citizens to the river. From this it appears that the ground was not then in a condition to be used as a street; and that much labor was required to place it in that situation. But, if it were dedicated for that purpose, at the time the survey of the town was made, it is essential that it shall have been used as such within a limited time? This would hardly be pretended, as it regards other streets in the town. Suppose Market street, or Wood street, leading north and south, had not been \*im- [ \*506 ] proved by the city of Pittsburgh until this time, could the original proprietors claim it as their property? If the dedication of these streets to the public were a matter of doubt, and a jury were about to inquire into the fact; it is admitted that their not having been improved or used as streets, would be a circumstance which the jury might weigh against the proof of dedication. But it would most clearly be error for the court to instruct the jury, that unless the ground claimed for these streets was in a situation to be used as streets, and had been so used, there could have been no dedication. This appears to have been the purport of the instruction to the jury, in regard to Water street. The words used were, that the jury must be "satisfied, not merely that the open space was used by the inhabitants of Pittsburgh or others, but that it was used as a highway or street; and that, in weighing the evidence on this point, they would naturally inquire, whether, from the nature of the ground, it was capable of being so used."

From this instruction the jury were required to find against the right asserted in behalf of the city, unless the ground referred to had been used as a street or highway. This substituted the use for the right; and made the latter to depend upon the former. The right

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was not necessarily connected with the use within a limited period; as no such condition appears to have been imposed at the time it was granted. Whilst the circuit court might have called the attention of the jury to the fact that the ground in controversy never having been used as a street, was a circumstance which they ought to weigh against the dedication contended for, it was error in them to say, in substance, there could be no right without the use. This withdrew from the jury the main point of inquiry, by substituting another; the existence or non-existence of which was not inconsistent with the principal fact. It was not essential for the city to show that the entire slip of land referred to had been used as a street, but it was essential to establish that it had been dedicated as such.

The second objection to the charge is, that the court instructed "the jury that no title in the corporation had been shown to a single foot of ground within the city; and that the acts of ownership exercised [ \* 507 ] by the corporation, were altogether inconsistent with the right asserted in behalf of the "public; and plainly conveying to the jury the opinion that the improper or peculiar use made of the ground in question by the corporation, gave the plaintiff a right to recover.

The inference drawn in the conclusion of this assignment of error may not be fully sustained by the language of the court; but they did instruct the jury that the acts of 'ownership exercised by the corporation, in the way which had been stated, were altogether inconsistent with the right asserted in behalf of the public; since, if the whole of this ground, to low-water mark on the river, had been dedicated for a street, it was vested as such in the public, subject to be regulated and preserved by the corporation, and could not legally be treated and used as private property by that body."

The court here refer to certain wharves which have been constructed by the city along the Monongahela, and on the ground claimed to be Water street. Connected with these wharves is a graduated pavement, so as to render access to them from the city easy, and a tax is imposed on steamboats and other vessels for the use of them.

If this ground had been dedicated for a particular purpose, and the city authorities had appropriated it to an entirely different purpose, it might afford ground for the interference of a court of chancery to compel a specific execution of the trust, by restraining the corporation, or by causing the removal of obstructions. But, even in such a case, the property dedicated would not revert to the original owner. The use would still remain in the public, limited only by the conditions imposed in the grant.

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It does not appear, however, that the construction of wharves on the river and the pavement of the ground have, in the least degree, obstructed its use as a street. The pavement has undoubtedly promoted the public convenience; and if the whole line of the street were graduated and paved to the water as a public way, it would be much more valuable than in its present condition. The wharves cause no obstructions to the use of this ground as a street; and whether the city authorities have transcended their power in raising a revenue from them, by the improvements which have been made, is a question not necessarily involved in the case.

If that part of this ground which is connected with the water \* has been appropriated to other uses than as a [ \* 508 ] right of way, they are not inconsistent with such right; but if such had been the case, on that ground the jury could not have rendered a verdict against the city. Such uses might have tended to show that the dedication of this ground for a street, as contended for, had not been made; but no other or greater effect should have been given to them, had they been fully established, and their inconsistency with the right asserted clearly made out.

The third objection taken to the charge is that the court instructed "the jury that the deeds of Ormsby, and to Craig and Bayard, were inconsistent with a dedication of a space south of the Water street lots to the river, and that these deeds conveyed the ground to the river, subject to the easement over a part of it."

The deed of Ormsby to Gregg and Sidney bears date the 5th day of November, in the year of our Lord 1798, and was for "a certain lot of ground, situate in the town of Pittsburgh aforesaid, marked in the plan of said town number 183, bounded by Front street, the River Monongahela, and lots numbered 182 and 184, it being the same lot or piece of ground which the Honorable John Penn and John Penn, Jr., late proprietors of Pennsylvania, by their indenture bearing date the 2d day of October, 1784, did grant and convey unto the said Ormsby."

The deed to Craig and Bayard from the Penns bears date the 31st day of December, 1784, and conveyed to the grantees "and their heirs and assigns thirty-two lots or pieces of ground situate in a point formed by the junction of the two rivers, Monongahela and Alleghany, in the town of Pittsburgh, marked in the general plan of said town, made by Colonel Woods, numbers one, &c.; which said plan is recorded, or intended to be recorded, in the office for the recording of deeds for the county of Westmoreland."

The said lots are bounded northwardly by the said Alleghany River,

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eastwardly by Morberry or Mulberry street, southwardly by Penn street, and southwestwardly by the Monongahela River.

[ \* 509 ] \* The agreement under which this deed is executed is dated on the 22d day of January, 1784, which was about six months before the town was surveyed. By this agreement, the Penns sold to Craig and Bayard "a certain tract of land in their manor of Pittsburgh, lying and being in a point formed by the junction of the rivers Monongahela and Alleghany, bounded on two sides by the rivers aforesaid," &c.

As this last deed covers ground which had been sold before the town was laid out, it is not perceived how it could be considered as inconsistent with the dedication contended for. It is true, the deed was not executed until after the town plat was formed; but it was executed by force of a purchase made prior to the survey of the town, and the purchaser had a right to insist on the boundaries designated in the agreement.

If the present contest were limited to the ground embraced in this agreement, and included in the general description of the deed, it might become a serious question whether the description, in the deed, of the lots, by their numbers as designated on Woods's plan of the town, would not control that part of the description which refers to the Monongahela River. But, if it were admitted that this deed conveyed the land to the river, it could, under the circumstances, have no other effect than to restrict the dedication of the ground for a street to the extent of the deed.

The deed from Ormsby called for the lot by its number, as marked on the plan of the town, and bounded by Front street, the River Monongahela, and lots numbered 182 and 184. The construction given to these calls was, that the ground to the river was conveyed, subject to the easement over a part of it. And this deed, the jury was instructed, was inconsistent with the dedication of the ground to the water as a street.

It is contended, on the part of the defendant in error, that the charge given to the jury on this point was the legal construction of the deed, and consequently was a matter for the court to determine.

The right of the court to decide on the legal effect of written instruments cannot be controverted; but the question of boundary is always a matter of fact for the determination of the jury.

[ \* 510 ] It is the province of a court to instruct the jury \* that they should fix the boundaries of the tract in controversy by an examination of the whole evidence, and that artificial or natural boundaries called for, control a call for course and distance. But it

should withdraw the facts from the jury, if the court were to fix the

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boundaries called for, and then determine on the legal effect of the instrument.

Suppose the controversy had been between the city of Pittsburgh and the persons claiming under Ormsby, who asserted a right to the ground, under his deed, to the river. The city in such a case would have contended, before the jury, that, taking the calls of the deed together, they would limit the conveyance to the lot designated on the plan of the town; and would not this have been a question for the jury to determine, under the instruction of the court? an instruction which should lay down the general principles of law in such a case, and the legal effect that would result from a certain state of facts, but which should not take from the jury the right of determining on the limits of the lot from the calls in the deed. These calls are established by evidence extrinsic of the deed. They are matters of fact for the investigation of the jury.

In principle, there is no difference between the case under consideration and questions of boundary which are of daily occurrence. It is as much the province of a jury to determine the limits of a lot in a city or town, as the limits of any tract of land, however large or small. And if the court, in a question of boundary, may fix the limits of the grant, and then say what the legal effect of it shall be, there is nothing left for the action of the jury.

The deed from Ormsby called for a lot designated on the town plat 183, bounded by Front street, the River Monongahela, and lots numbered 182 and 184.

The plat of the town, which is referred to as containing a designation of the boundaries of the lot, fixes those boundaries as satisfactorily as any natural objects could fix them. Front street is called for, which lies parallel with Water street, as the northern boundary of the lot; and the adjoining lots lying east and west of it are named as the eastern and western boundaries.

\* From this description, can any one doubt the intention [ \* 511 ] of the grantor, and the understanding of the grantee? Does lot one hundred and eighty-three, as marked on the plan of the town, extend to the river? This will not be pretended; nor that lots one hundred and eighty-two and one hundred and eighty-four extend to the river. The call for the river, then, in the deed in question, is inconsistent with the other calls in the deed. By the town plat, the southern boundary of the lot is limited by Water street, and by a call for this boundary it is as fixed and certain as the call for the river. The same may be said of the eastern and western boundary of the lot. Shall these calls be all disregarded or controlled by the single call for the natural boundary?

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In a late case, this court decided that a call in a patent for a different county from that in which the land was situated, might be controlled by other calls in the patent. Such was the charge given to the jury in the court below, and it was sustained by this court.

The circuit court, therefore, instead of saying to the jury that the calls in this deed, and the one to Craig and Bayard, were inconsistent with the dedication of the ground referred to, should have instructed them that the different calls ought to be taken together; and that the calls for the river might be controlled by the other calls in the deeds, if the jury should be satisfied that such call had been inserted through inadvertence or mistake.

The fourth and last exception taken to the charge of the court is, that they erred in instructing the jury, "that if a street or streets leading to the Monongahela River were necessary to the enjoyment, by the inhabitants, of their property in the town, derived from persons under whom the plaintiff claimed, they are entitled to have them laid off over the land in dispute, of right, and not of favor; and that the law points out a mode by which this right may be enforced."

This instruction does not involve a point which was material in the case; and though it were erroneous, it might not afford ground for the reversal of the judgment of the circuit court. Whether this right existed or not, it is not conceived how it could have had any influence with the jury.

The court seem to refer to the law of Pennsylvania, regulating the opening of public roads. But the establishment of a [ \*512 ] \*public road cannot be claimed as a matter of right. An application must be made in the first instance, by petition to the court of quarter sessions; a view of the proposed road is directed, and its establishment depends upon the report of the viewers and other necessary sanctions.

This law, however, it is insisted, could have no operation in the city of Pittsburgh; that its streets and alleys are opened and regulated under the corporate authorities, and not by the provisions of the road law.

It is not deemed necessary, in deciding the points raised in this case, to notice all the questions discussed by the counsel in their arguments at the bar.

Whether Water street extended to low or high-water mark, can be of no importance in the present controversy. If its southern boundary be limited by high-water mark, it is clear that the proprietors parted with all their right. It is admitted by both parties, that the River Monongahela, being a navigable stream, belongs to the

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public; and a free use of it may be rightfully claimed by the public, whatever may be the extent of its volume of water. If Water street be bounded by the river on the south, it is only limited by the public right. To contend that between this boundary and the public right, a private and hostile right could exist, would not only be unreasonable, but against law.

Tench Francis, the attorney in fact for the Penn family, and the agent who succeeded him, must be considered, for some purposes, as the principal in these transactions. His principals were in Europe; and to his discretion and superintendence they, of necessity, consigned the management of their property in this country. The long acquiescence, therefore, in the plan of the town, as returned by Woods, affords a strong presumption against the right asserted by the plaintiff below in this action.

The town was laid out in the spring or summer of 1784; no act was done by the proprietors showing any claim to the land in controversy, until September, 1814, when the deed to Wilson was executed. Here is a lapse of about thirty years, within which no right is asserted by the Penn family, hostile to that which was exercised by the city, in the use of this ground, to the extent which its means enabled it to improve, \* and the public convenience seemed to require. A title which has remained dormant for so great a number of years, and while the property was used for public purposes, and necessarily within the knowledge of the agents of the proprietors, is now asserted under doubtful circumstances of right. In some cases a dedication of property to public use, as for instance a street or public road, where the public has enjoyed the unmolested use of it for six or seven years, has been deemed sufficient evidence of dedication. This lapse of time, connected with the public use and the determination expressed by the agent at the time the town was laid out to dispose of the whole of the manor, affords strong grounds to presume that no reservation of any part of the manor was intended to be made; and that the slip of land in controversy was not reversed. These were facts proper for the consideration of the jury in determining the fact of dedication. They were calculated to have a strong influence to rebut the presumptions relied on by the plaintiff in the court below.

If it were necessary, an unmolested possession for thirty years would authorize the presumption of a grant. Indeed, under peculiar circumstances, a grant has been presumed from a possession less than the number of years required to bar the action of ejectment by the statute of limitations.

By the common law the fee in the soil remains in the original

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owner, where a public road is established over it; but the use of the road is in the public. The owner parts with this use only, for if the road shall be vacated by the public, he resumes the exclusive possession of the ground; and while it is used as a highway, he is entitled to the timber and grass which may grow upon the surface, and to all minerals which may be found below it. He may bring an action of trespass against any one who obstructs the road.

In the discussion of this case, the same doctrine has been applied by the counsel for the defendant in error to the streets and alleys of a town; but in deciding the points raised by the bill of exceptions, it is not necessary to determine this question.

Where the proprietor of a town disposes of all his interest in it, he would seem to stand in a different relation to the right of [\*514] soil, in regard to the streets and alleys of the town, from \*the individual over whose soil a public road is established, and who continues to hold the land on both sides of it. Whether the purchasers of town lots are not, in this respect, the owners of the soil over which the streets and alleys are laid, as appurtenant to the adjoining lots, is a point not essentially involved in this case.

If the jury shall find that the ground in question was dedicated to the public as a street or highway, or for other public purposes, to the river, either at high or low-water mark, the right of the city will be established, and the plaintiff in the ejectment must consequently fail to recover.

Upon a deliberate consideration of the points involved in the case, this court are clearly of the opinion that the judgment of the circuit court was erroneous, and it is therefore reversed, and the cause remanded for further proceedings.

10 P. 662; 11 P. 41; 12 P. 410; 9 H. 10; 14 H. 268; 23 W. 62.

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SAMUEL A. WORCESTER, Plaintiff in Error, *v.* THE STATE OF GEORGIA.

6 P. 515.

A return to a writ of error from this court to a state court, certified by the clerk of the court which pronounced the judgment, and to which the writ is addressed, and authenticated by the seal of the court, is in conformity to law, and brings the record regularly before this court.

The law of Georgia, which subjected to punishment all white persons residing within the limits of the Cherokee nation, and authorized their arrest within those limits, and their forcible removal therefrom, and their trial in a court of the State, was repugnant to the constitution, treaties, and laws of the United States, and so void; and a judgment against the plaintiff in error, under color of that law, was reversed by this court, under the 25th section of the Judiciary Act, (1 Stats. at Large, 85.)

The relations between the Indian tribes and the United States examined.

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\*ERROR to the superior court for the county of Gwinnett, [ \* 521 ] in the State of Georgia. The laws of the State of Georgia, and the substance of the indictment under which the plaintiff in error was convicted, are as follows.

On the 22d December, 1830, the legislature of the State of Georgia passed the following act:—

“ An act to prevent the exercise of assumed and arbitrary power, by all persons, under pretext of authority from the Cherokee Indians and their laws, and to prevent white persons from residing within that part of the chartered limits of Georgia, occupied by the Cherokee Indians, and to provide a guard for the protection of the gold mines, and to enforce the laws of the State within the aforesaid territory.

“ Be it enacted by the senate and house of representatives of the State of Georgia, in general assembly met, and it is hereby enacted by the authority of the same, that, after the 1st day of February, 1831, it shall not be lawful for any person or persons, under color or pretence of authority from said Cherokee tribe, or as headmen, chiefs, or warriors of said tribe, to cause or procure by any means the assembling of any council or other pretended legislative body of the said Indians or others living among them, for the purpose of legislating, (or for any other purpose whatever.) And persons offending against the provisions of this section shall be guilty of a high misdemeanor, and subject to indictment therefor, and, on conviction, shall be punished by confinement at hard labor in the penitentiary for the space of four years.

“ Sect. 2. And be it further enacted by the authority aforesaid, that, after the time aforesaid, it shall not be lawful for any person or persons, under pretext of authority from the Cherokee tribe, or as representatives, chiefs, headmen or warriors of said tribe, to meet or assemble as a council, assembly, \*convention, or in any [ \* 522 ] other capacity, for the purpose of making laws, orders or regulations for said tribe. And all persons offending against the provisions of this section, shall be guilty of a high misdemeanor, and subject to an indictment, and, on conviction thereof, shall undergo an imprisonment in the penitentiary at hard labor for the space of four years.

“ Sect. 3. And be it further enacted by the authority aforesaid, that, after the time aforesaid, it shall not be lawful for any person or persons, under color or by authority of the Cherokee tribe, or any of its laws or regulations, to hold any court or tribunal whatever, for the purpose of hearing and determining causes, either civil or criminal, or to give any judgment in such causes, or to issue, or cause to issue, any process against the person or property of any of said tribe. And

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all persons offending against the provisions of this section shall be guilty of a high misdemeanor, and subject to indictment, and, on conviction thereof, shall be imprisoned in the penitentiary at hard labor for the space of four years.

" Sect. 4. And be it further enacted by the authority aforesaid, that, after the time aforesaid, it shall not be lawful for any person or persons, as a ministerial officer, or in any other capacity, to execute any precept, command, or process issued by any court or tribunal in the Cherokee tribe, on the persons or property of any of said tribe. And all persons offending against the provisions of this section, shall be guilty of a trespass, and subject to indictment, and, on conviction thereof, shall be punished by fine and imprisonment in the jail or in the penitentiary, not longer than four years, at the discretion of the court.

" Sect. 5. And be it further enacted by the authority aforesaid, that, after the time aforesaid, it shall not be lawful for any person or persons to confiscate, or attempt to confiscate, or otherwise to cause a forfeiture of the property or estate of any Indian of said tribe, in consequence of his enrolling himself and family for emigration, or offering to enroll for emigration, or any other act of said Indian, in furtherance of his intention to emigrate. And persons offending against the provisions of this section shall be guilty of high misdemeanor, and, on conviction, shall undergo an imprisonment in the penitentiary at hard labor for the space of four years.

[ \* 523 ] " Sect. 6. And be it further enacted by the authority aforesaid, that none of the provisions of this act shall be so construed as to prevent said tribe, its headmen, chiefs, or other representatives, from meeting any agent or commissioner on the part of this State or the United States, for any purpose whatever.

" Sect. 7. And be it further enacted by the authority aforesaid, that all white persons residing within the limits of the Cherokee nation, on the 1st day of March next, or at any time thereafter, without a license or permit from his excellency the governor, or from such agent as his excellency the governor shall authorize to grant such permit or license, and who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanor, and, upon conviction thereof, shall be punished by confinement to the penitentiary at hard labor for a term not less than four years: provided, that the provisions of this section shall not be so construed as to extend to any authorized agent or agents of the government of the United States or of this State, or to any person or persons who may rent any of those improvements which have been abandoned by Indians who have emigrated west of the Mississippi: provided, nothing com-

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tained in this section shall be so construed as to extend to white females, and all male children under twenty-one years of age.

“ Sect. 8. And be it further enacted by the authority aforesaid, that all white persons, citizens of the State of Georgia, who have procured a license in writing from his excellency the governor, or from such agent as his excellency the governor shall authorize to grant such permit or license, to reside within the limits of the Cherokee nation, and who have taken the following oath, viz: “ I, A B, do solemnly swear (or affirm, as the case may be,) that I will support and defend the constitution and laws of the State of Georgia, and uprightly demean myself as a citizen thereof, so help me God,” shall be, and the same are hereby declared, exempt and free from the operation of the seventh section of this act.

“ Sect. 9. And be it further enacted, that his excellency the governor be, and he is hereby authorized to grant licenses to reside within the limits of the Cherokee nation, according to the provisions of the eighth section of this act.

“ Sect. 10. And be it further enacted by the authority aforesaid, that no person shall collect or claim any toll from [ \* 524 ] any person, for passing any turnpike gate or toll bridge, by authority of any act or law of the Cherokee tribe, or any chief or headman or men of the same.

“ Sect. 11. And be it further enacted by the authority aforesaid, that his excellency the governor be, and he is hereby empowered, should he deem it necessary, either for the protection of the mines, or for the enforcement of the laws, of force within the Cherokee nation, to raise and organize a guard, to be employed on foot, or mounted, as occasion may require, which shall not consist of more than sixty persons, which guard shall be under the command of the commissioner or agent appointed by the governor, to protect the mines, with power to dismiss from the service any member of said guard, on paying the wages due for services rendered, for disorderly conduct, and make appointments to fill the vacancies occasioned by such dismissal.

“ Sect. 12. And be it further enacted by the authority aforesaid, that each person who may belong to said guard, shall receive for his compensation at the rate of \$15 dollars per month when on foot, and at the rate of \$20 per month when mounted, for every month that such person is engaged in actual service; and, in the event that the commissioner or agent herein referred to should die, resign, or fail to perform the duties herein required of him, his excellency the governor is hereby authorized and required to appoint in his stead some other fit and proper person to the command of said guard:

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and the commissioner or agent having the command of the guard aforesaid, for the better discipline thereof, shall appoint three sergeants, who shall receive at the rate of \$20 per month while serving on foot, and \$25 per month when mounted, as compensation whilst in actual service.

" Sect. 13. And be it further enacted by the authority aforesaid, that the said guard, or any member of them, shall be, and they are hereby authorized and empowered to arrest any person legally charged with, or detected in a violation of the laws of the State, and to convey, as soon as practicable, the person so arrested before a justice of the peace, judge of the superior or justice of inferior court of this State, to be dealt with according to law; and the pay and support of said guard be provided out of the fund already appropriated for the protection of the gold mines."

The legislature of Georgia, on the 19th December, 1829, passed the following act:—

" An act to add the territory lying within the chartered limits of Georgia and now in the occupancy of the Cherokee Indians, to the counties of Carroll, De Kalb, Gwinnett, Hall, and Habersham, and to extend the laws of this State over the same, and to annul all laws and ordinances made by the Cherokee nation of Indians, and to provide for the compensation of officers serving legal process in said territory, and to regulate the testimony of Indians, and to repeal the 9th section of the act of 1828 upon this subject.

" Sect. 1. Be it enacted by the senate and house of representatives of the State of Georgia, in general assembly met, and it is hereby enacted by the authority of the same, that from and after the passing of this act, all that part of the unlocated territory within the limits of this State, and which lies between the Alabama line and the old path leading from the Buzzard Roost on the Chattahoochee, to Sally Hughes's, on the Hightower River; thence to Thomas Pelet's, on the old federal road; thence with said road to the Alabama line, be, and the same is hereby added to, and shall become a part of, the county of Carroll.

" Sect. 2. And be it further enacted, that all that part of said territory lying and being north of the last-mentioned line, and south of the road running from Charles Gait's Ferry, on the Chattahoochee River, to Dick Roe's, to where it intersects with the path aforesaid, be, and the same is hereby added to, and shall become a part of, the county of De Kalb.

" Sect. 3. And be it further enacted, that all that part of the said territory lying north of the last-mentioned line, and south of a line commencing at the mouth of Baldridge's Creek; thence up said

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creek to its source; from thence to where the federal road crosses the Hightower; thence with said road to the Tennessee line, be, and the same is hereby added to, and shall become part of, the county of Gwinnett.

" Sect. 4. And be it further enacted, that all that part of the said territory lying north of said last-mentioned line, and south [ \*526 ] of a line to commence on the Chestatee River, at the mouth of Yoholo Creek; thence up said creek to the top of the Blue Ridge; thence to the head waters of Notley River; thence down said river to the boundary line of Georgia, be, and the same is hereby added to, and shall become a part of, the county of Hall.

" Sect. 5. And be it further enacted, that all that part of said territory lying north of said last-mentioned line, within the limits of this State, be, and the same is hereby added to, and shall become a part of, the county of Habersham.

" Sect. 6. And be it further enacted, that all the laws, both civil and criminal, of this State, be, and the same are hereby extended over said portions of territory, respectively; and all persons whatever, residing within the same, shall, after the 1st day of June next, be subject and liable to the operation of said laws, in the same manner as other citizens of this State, or the citizens of said counties, respectively; and all writs and processes whatever, issued by the courts or officers of said courts, shall extend over, and operate on, the portions of territory hereby added to the same, respectively.

" Sect. 7. And be it further enacted, that after the 1st day of June next, all laws, ordinances, orders, and regulations, of any kind whatever, made, passed, or enacted by the Cherokee Indians, either in general council or in any other way whatever, or by any authority whatever of said tribe, be, and the same are hereby declared to be, null and void, and of no effect, as if the same had never existed; and in all cases of indictment or civil suits, it shall not be lawful for the defendant to justify under any of said laws, ordinances, orders, or regulations; nor shall the courts of this State permit the same to be given in evidence on the trial of any suit whatever.

" Sect. 8. And be it further enacted, that it shall not be lawful for any person or body of persons, by arbitrary power or by virtue of any pretended rule, ordinance, law, or custom of said Cherokee nation, to prevent by threats, menaces, or other means, or endeavor to prevent, any Indian of said nation, residing within the chartered limits of this State, from enrolling as an emigrant, or actually emigrating or removing from said nation; nor shall it be lawful for any person or body of persons, by arbitrary power or by virtue of any pretended rule, ordinance, law, or custom of said nation, to [ \*527 ]



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punish, in any manner, or to molest either the person or property, or to abridge the rights or privileges of any Indian, for enrolling his or her name as an emigrant, or for emigrating or intending to emigrate, from said nation.

“ Sect. 9. And be it further enacted, that any person or body of persons offending against the provisions of the foregoing section, shall be guilty of high misdemeanor, subject to indictment, and on conviction shall be punished by confinement in the common jail of any county of this State, or by confinement at hard labor in the penitentiary for a term not exceeding four years, at the discretion of the court.

“ Sect. 10. And be it further enacted, that it shall not be lawful for any person or body of persons, by arbitrary power, or under color of any pretended rule, ordinance, law, or custom of said nation, to prevent or offer to prevent, or deter any Indian headman, chief, or warrior of said nation, residing within the chartered limits of this State, from selling or ceding to the United States, for the use of Georgia, the whole or any part of said territory, or to prevent, or offer to prevent, any Indian, headman, chief, or warrior of said nation, residing as aforesaid, from meeting in council or treaty any commissioner or commissioners on the part of the United States, for any purpose whatever.

“ Sect. 11. And be it further enacted, that any person or body of persons offending against the provisions of the foregoing sections, shall be guilty of a high misdemeanor, subject to indictment, and on conviction shall be confined at hard labor in the penitentiary for not less than four nor longer than six years, at the discretion of the court.

“ Sect. 12. And be it further enacted, that it shall not be lawful for any person or body of persons, by arbitrary force, or under color of any pretended rules, ordinances, law, or custom of said nation, to take the life of any Indian residing as aforesaid, for enlisting as an emigrant; attempting to emigrate; ceding, or attempting to cede, as aforesaid, the whole or any part of the said territory; or meeting or attempting to meet, in treaty or in council, as aforesaid, any commissioner or commissioners aforesaid; and any person or body of persons offending against the provisions of this section, shall be guilty [ \* 528 ] of \* murder, subject to indictment, and, on conviction, shall suffer death by hanging.

“ Sect. 13. And be it further enacted, that, should any of the foregoing offences be committed under color of any pretended rules, ordinances, custom, or law of said nation, all persons acting therein, either as individuals or as pretended executive, ministerial, or judicial

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officers, shall be deemed and considered as principals, and subject to the pains and penalties hereinbefore described.

"Sect. 14. And be it further enacted, that for all demands which may come within the jurisdiction of a magistrate's court, suit may be brought for the same in the nearest district of the county to which the territory is hereby annexed; and all officers serving any legal process on any person living on any portion of the territory herein named, shall be entitled to recover the sum of five cents for every mile he may ride to serve the same, after crossing the present limits of the said counties, in addition to the fees already allowed by law; and in case any of the said officers should be resisted in the execution of any legal process issued by any court or magistrate, justice of the inferior court, or judge of the superior court of any of said counties, he is hereby authorized to call out a sufficient number of the militia of said counties to aid and protect him in the execution of this duty.

"Sect. 15. And be it further enacted, that no Indian or descendant of any Indian, residing within the Creek or Cherokee nations of Indians, shall be deemed a competent witness in any court of this State to which a white person may be a party, except such white person resides with the said nation."

In September, 1831, the grand-jurors for the county of Gwinnett in the State of Georgia, presented to the superior court of the county an indictment, in substance as follows:—

"For that the said Elizur Butler, Samuel A. \* Worcester, [ \* 529 ] James Trott, Samuel Mays, Surry Eaton, Austin Copeland, and Edward D. Losure, white persons as aforesaid, on the 15th day of July, 1831, did reside in that part of the Cherokee nation attached by the laws of said State to the said county, and in the county aforesaid, without a license or permit from his excellency the governor of said State, or from any agent authorized by his excellency the governor aforesaid to grant such permit or license, and without having taken the oath to support and defend the constitution and laws of the State of Georgia, and uprightly to demean themselves as citizens thereof, contrary to the laws of said State, the good order, peace, and dignity thereof."

The plea of the defendant and the subsequent proceedings are stated in the opinion of the court.

\* The case of Elizur Butler, plaintiff in error v. The [ \* 534 ] State of Georgia, was brought before the supreme court in the same manner.

*Sergeant and Wirt*, with whom also was *Elisha W. Chester*.

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[ \* 536 ] \* MARSHALL, C. J., delivered the opinion of the court.

This cause, in every point of view in which it can be placed, is of the deepest interest.

The defendant is a State, a member of the Union, which has exercised the powers of government over a people who deny its jurisdiction, and are under the protection of the United States.

The plaintiff is a citizen of the State of Vermont, condemned to hard labor for four years in the penitentiary of Georgia under color of an act which he alleges to be repugnant to the constitution, laws, and treaties of the United States.

The legislative power of a State, the controlling power of the constitution and laws of the United States, the rights, if they have any, the political existence of a once numerous and powerful people, the personal liberty of a citizen, are all involved in the subject now to be considered.

It behooves this court, in every case, more especially in this, to examine into its jurisdiction with scrutinizing eyes, before it proceeds to the exercise of a power which is controverted.

The first step in the performance of this duty is the inquiry whether the record is properly before the court.

It is certified by the clerk of the court, which pronounced the judgment of condemnation under which the plaintiff in error is imprisoned, and is also authenticated by the seal of the court. It is returned with, and annexed to, a writ of error issued in regular form, the citation being signed by one of the associate justices of the supreme court, and served on the governor and attorney-general of the State, more than thirty days before the commencement of the term to which the writ of error was returnable.

The Judicial Act<sup>1</sup> (§§ 22, 25, 2 Laws U. S. 64, 65,) so far as it prescribes the mode of proceeding, appears to have been literally pursued.

In February, 1797, a rule (6 Wheat. Rules) was made on this subject, in the following words: "It is ordered by the court, that the clerk of the court to which any writ of error shall be directed, [ \* 537 ] may make return of the same by transmitting a true copy of the record, and of all proceedings in the same, under his hand and the seal of the court."

This has been done. But the signature of the judge has not been added to that of the clerk. The law does not require it. The rule does not require it.

In the case of Martin v. Hunter's Lessee, 1 Wheat. 304, 361, an

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<sup>1</sup> 1 Stats. at Large, 73.

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exception was taken to the return of the refusal of the state court to enter a prior judgment of reversal by this court, because it was not made by the judge of the state court to which the writ was directed; but the exception was overruled, and the return was held sufficient. In *Buel v. Van Ness*, 8 Wheat. 312, also a writ of error to a state court, the record was authenticated in the same manner. No exception was taken to it. These were civil cases. But it has been truly said at the bar, that, in regard to this process, the law makes no distinction between a criminal and civil case. The same return is required in both. If the sanction of the court could be necessary for the establishment of this position, it has been silently given.

*M'Culloch v. The State of Maryland*, 4 Wheat. 316, was a *qui tam* action, brought to recover a penalty, and the record was authenticated by the seal of the court and the signature of the clerk, without that of a judge. *Brown et al. v. The State of Maryland*, 12 Wheat. 419, was an indictment for a fine and forfeiture. The record in this case, too, was authenticated by the seal of the court and the certificate of the clerk. The practice is both ways.

The record, then, according to the Judiciary Act, and the rule and the practice of the court, is regularly before us. The more important inquiry is, does it exhibit a case cognizable by this tribunal?

The indictment charges the plaintiff in error, and others, being white persons, with the offence of "residing within the limits of the Cherokee nation without a license," and "without having taken the oath to support and defend the constitution and laws of the State of Georgia."

The defendant in the state court appeared in proper person, and filed the following plea:—

"And the said Samuel A. Worcester, in his own proper person, comes and says that this court ought not to take further \* cognizance of the action and prosecution aforesaid, be- [ \* 538 ] cause, he says, that, on the 15th day of July, in the year 1831, he was, and still is, a resident in the Cherokee nation, and that the said supposed crime or crimes, and each of them, were committed, if committed at all, at the town of New Echota, in the said Cherokee nation, out of the jurisdiction of this court, and not in the county of Gwinnett, or elsewhere within the jurisdiction of this court; and this defendant saith that he is a citizen of the State of Vermont, one of the United States of America, and that he entered the aforesaid Cherokee nation in the capacity of a duly authorized missionary of the American Board of Commissioners for Foreign Missions, under the authority of the President of the United States, and has not since been required by him to leave it; that he was at the time

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of his arrest engaged in preaching the gospel to the Cherokee Indians, and in translating the sacred Scriptures into their language, with the permission and approval of the said Cherokee nation, and in accordance with the humane policy of the government of the United States, for the civilization and improvement of the Indians; and that his residence there, for this purpose, is the residence charged in the aforesaid indictment; and this defendant further saith that this prosecution the State of Georgia ought not to have or maintain, because, he saith, that several treaties have, from time to time, been entered into between the United States and the Cherokee nation of Indians, to wit, at Hopewell, on the 28th day of November, 1785; at Holston, on the 2d day of July, 1791; at Philadelphia, on the 26th day of June, 1794; at Tellico, on the 2d day of October, 1798; at Tellico, on the 24th day of October, 1804; at Tellico, on the 25th day of October, 1805; at Tellico, on the 27th day of October, 1805; at Washington City, on the 7th day of January, 1805; at Washington City, on the 22d day of March, 1816; at the Chickasaw Council House, on the 14th day of September, 1816; at the Cherokee Agency, on the 8th day of July, 1817; and at Washington City, on the 27th day of February, 1819;<sup>1</sup> all which treaties have been duly ratified by the senate of the United States of America, and, by which treaties, the United States of America acknowledge the said Cherokee nation to be a sovereign nation, authorized to govern themselves, and all persons who have settled within their territory free from any right of

legislative interference by the several States composing the [ \* 539 ] \* United States of America, in reference to acts done within their own territory; and, by which treaties, the whole of the territory now occupied by the Cherokee nation, on the east of the Mississippi, has been solemnly guaranteed to them; all of which treaties are existing treaties at this day, and in full force. By these treaties, and particularly by the treaties of Hopewell and Holston, the aforesaid territory is acknowledged to lie without the jurisdiction of the several States composing the Union of the United States; and it is thereby specially stipulated that the citizens of the United States shall not enter the aforesaid territory, even on a visit, without a passport from the governor of a State, or from some one duly authorized thereto by the President of the United States; all of which will more fully and at large appear by reference to the aforesaid treaties. And this defendant saith, that the several acts charged in the bill of indictment were done, or omitted to be done, if at all, within the said territory so recognized as belonging to the said nation, and so, as aforesaid, held by them under the guarantee of the

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<sup>1</sup> 7 Stats. at Large, 18-195.

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United States; that, for those acts, the defendant is not amenable to the laws of Georgia, nor to the jurisdiction of the courts of the said State; and that the laws of the State of Georgia which profess to add the said territory to the several adjacent counties of the said State, and to extend the laws of Georgia over the said territory, and persons inhabiting the same, and, in particular, the act on which this indictment against this defendant was grounded, to wit, 'An act entitled an act to prevent the exercise of assumed and arbitrary power by all persons, under pretext of authority from the Cherokee Indians, and their laws, and to prevent white persons from residing within that part of the chartered limits of Georgia occupied by the Cherokee Indians, and to provide a guard for the protection of the gold mines, and to enforce the laws of the State within the aforesaid territory,' are repugnant to the aforesaid treaties, which, according to the constitution of the United States, compose a part of the supreme law of the land; and that these laws of Georgia are, therefore, unconstitutional, void, and of no effect; that the said laws of Georgia are also unconstitutional and void because they impair the obligation of the various contracts formed by and between the aforesaid Cherokee nation and the said United States of America, as above recited; also, that the said laws of Georgia are un- [ \* 540 ] constitutional and void because they interfere with and attempt to regulate and control the intercourse with the said Cherokee nation, which, by the said constitution, belongs exclusively to the congress of the United States; and because the said laws are repugnant to the statute of the United States, passed on the — day of March, 1802,<sup>1</sup> entitled 'An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers; ' and that, therefore, this court has no jurisdiction to cause this defendant to make further or other answer to the said bill of indictment, or further to try and punish this defendant for the said supposed offence or offences alleged in the bill of indictment, or any of them; and, therefore, this defendant prays judgment whether he shall be held bound to answer further to said indictment."

This plea was overruled by the court. And the prisoner, being arraigned, plead not guilty. The jury found a verdict against him, and the court sentenced him to hard labor in the penitentiary for the term of four years.

By overruling this plea, the court decided that the matter it contained was not a bar to the action. The plea, therefore, must be examined, for the purpose of determining whether it makes a case which brings the party within the provisions of the 25th

<sup>1</sup> 2 Stats. at Large, 139.

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section of the "act to establish the judicial courts of the United States."

The plea avers, that the residence, charged in the indictment, was under the authority of the President of the United States, and with the permission and approval of the Cherokee nation. That the treaties subsisting between the United States and the Cherokees, acknowledge their right as a sovereign nation to govern themselves and all persons who have settled within their territory, free from any right of legislative interference by the several States composing the United States of America. That the act under which the prosecution was instituted is repugnant to the said treaties, and is, therefore, unconstitutional and void. That the said act is, also, unconstitutional; because it interferes with, and attempts to regulate and control, the intercourse with the Cherokee nation, which belongs exclusively to congress; and because, also, it is repugnant to the statute \*541] of the United States, entitled "an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers."

Let the averments of this plea be compared with the 25th section of the Judicial Act.

That section enumerates the cases in which the final judgment or decree of a state court may be revised in the supreme court of the United States. These are, "where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption, specially set up or claimed by either party under such clause of the said constitution, treaty, statute, or commission."

The indictment and plea, in this case, draw in question, we think, the validity of the treaties made by the United States with the Cherokee Indians. If not so, their construction is certainly drawn in question; and the decision has been, if not against their validity, "against the right, privilege, or exemption, specially set up and claimed under them." They also draw into question the validity of a statute of the State of Georgia, "on the ground of its being repugnant to the constitution, treaties, and laws of the United States, and the decision is in favor of its validity."

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It is then, we think, too clear for controversy that the act of congress by which this court is constituted, has given it the power, and, of course, imposed on it the duty, of exercising jurisdiction in this case. This duty, however unpleasant, cannot be avoided. Those who fill the judicial department have no discretion in selecting the subjects to be brought before them. We must examine the defence set up in this plea. We must inquire and decide whether the act of the legislature of Georgia, under which the plaintiff in error has been prosecuted and condemned, be consistent with, or repugnant to, the constitution, laws, and treaties of the United States.

\* It has been said at the bar, that the acts of the legislature of Georgia seize on the whole Cherokee country, parcel it out among the neighboring counties of the State, extend her code over the whole country, abolish its institutions and its laws, and annihilate its political existence. [ \* 542 ]

If this be the general effect of the system, let us inquire into the effect of the particular statute and section on which the indictment is founded.

It enacts, that "all white persons, residing within the limits of the Cherokee nation on the 1st day of March next, or at any time thereafter, without a license or permit from his excellency the governor, or from such agent as his excellency the governor shall authorize to grant such permit or license, and who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanor, and upon conviction thereof, shall be punished by confinement to the penitentiary at hard labor, for a term not less than four years."

The 11th section authorizes the governor, should he deem it necessary for the protection of the mines, or the enforcement of the laws in force within the Cherokee nation, to raise and organize a guard," &c.

The 13th section enacts, "that the said guard, or any member of them, shall be, and they are hereby authorized and empowered to arrest any person legally charged with or detected in a violation of the laws of this State, and to convey, as soon as practicable, the person so arrested, before a justice of the peace, judge of the superior, or justice of inferior court of this State, to be dealt with according to law."

The extra-territorial power of every legislature being limited in its action to its own citizens or subjects, the very passage of this act is an assertion of jurisdiction over the Cherokee nation, and of the rights and powers consequent on jurisdiction.

The first step, then, in the inquiry, which the constitution and laws impose on this court, is an examination of the rightfulness of this claim.

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America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions [ \* 543 ] of their own, and governing themselves by their \* own laws.

It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the preexisting rights of its ancient possessors.

After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting, and fishing.

Did these adventurers, by sailing along the coast and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil from the Atlantic to the Pacific, or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights, over hunters and fishermen, on agriculturists and manufacturers?

But power, war, conquest, give rights which, after possession, are conceded by the world, and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed some light on existing pretensions.

The great maritime powers of Europe discovered and visited different parts of this continent at nearly the same time. The object was too immense for any one of them to grasp the whole; and the claimants were too powerful to submit to the exclusive or unreasonable pretensions of any single potentate. To avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was, "that discovery gave title to the government by whose subjects or by whose authority it was made, against all [ \* 544 ] \*other European governments, which title might be consummated by possession." 8 Wheat. 573.

This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the

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soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not find that right on a denial of the right of the possessor to sell.

The relation between the Europeans and the natives was determined in each case by the particular government which asserted and could maintain this preëmptive privilege in the particular place. The United States succeeded to all the claims of Great Britain, both territorial and political; but no attempt, so far as is known, has been made to enlarge them. So far as they existed merely in theory, or were in their nature only exclusive of the claims of other European nations, they still retain their original character, and remain dormant. So far as they have been practically exerted, they exist in fact, are understood by both parties, are asserted by the one, and admitted by the other.

Soon after Great Britain determined on planting colonies in America, the king granted charters to companies of his subjects, who associated for the purpose of carrying the views of the crown into effect, and of enriching themselves. The first of these charters was made before possession was taken of any part of the country. They purport, generally, to convey the soil, from the Atlantic to the South Sea. This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea, that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from \* sea to sea, did not enter the mind of any man. They [ \* 545 ] were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what the crown did not affect to claim; nor was it so understood.

The power of making war is conferred by these charters on the colonies, but defensive war alone seems to have been contemplated. In the first charter to the first and second colonies, they are empowered, "for their several defences, to encounter, expulse, repel, and resist all persons who shall, without license," attempt to inhabit

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"within the said precincts and limits of the said several colonies, or that shall enterprise or attempt at any time hereafter the least detriment or annoyance of the said several colonies or plantations."

The charter to Connecticut concludes a general power to make defensive war with these terms: "and upon just causes to invade and destroy the natives or other enemies of the said colony."

The same power, in the same words, is conferred on the government of Rhode Island.

This power to repel invasion, and, upon just cause, to invade and destroy the natives, authorizes offensive as well as defensive war, but only "on just cause." The very terms imply the existence of a country to be invaded, and of an enemy who has given just cause of war.

The charter to William Penn contains the following recital: "and because, in so remote a country, near so many barbarous nations, the incursions, as well of the savages themselves, as of other enemies, pirates, and robbers, may probably be feared, therefore we have given," &c. The instrument then confers the power of war.

These barbarous nations, whose incursions were feared, and to repel whose incursions the power to make war was given, were surely not considered as the subjects of Penn, or occupying his lands during his pleasure.

The same clause is introduced into the charter to Lord Baltimore.

[ \* 546 ] \* The charter to Georgia professes to be granted for the charitable purpose of enabling poor subjects to gain a comfortable subsistence by cultivating lands in the American provinces, "at present waste and desolate." It recites: "and whereas our provinces in North America have been frequently ravaged by Indian enemies, more especially that of South Carolina, which, in the late war by the neighboring savages, was laid waste by fire and sword, and great numbers of the English inhabitants miserably massacred; and our loving subjects, who now inhabit there, by reason of the smallness of their numbers, will, in case of any new war, be exposed to the like calamities, inasmuch as their whole southern frontier continueth unsettled, and lieth open to the said savages."

These motives for planting the new colony are incompatible with the lofty ideas of granting the soil, and all its inhabitants from sea to sea. They demonstrate the truth that these grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned. The power of war is given only for defence, not for conquest.

The charters contain passages showing one of their objects to be

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the civilization of the Indians, and their conversion to Christianity— objects to be accomplished by conciliatory conduct and good example; not by extermination.

The actual state of things, and the practice of European nations, on so much of the American continent as lies between the Mississippi and the Atlantic, explain their claims and the charters they granted. Their pretensions unavoidably interfered with each other; though the discovery of one was admitted by all to exclude the claim of any other, the extent of that discovery was the subject of unceasing contest. Bloody conflicts arose between them, which gave importance and security to the neighboring nations. Fierce and warlike in their character, they might be formidable enemies, or effective friends. Instead of rousing their resentments, by asserting claims to their lands, or to dominion over their persons, their alliance was sought by flattering professions, and purchased by rich presents. The English, the French, and the Spaniards were equally competitors for their friendship and their aid. Not well acquainted with the exact meaning of \*words, nor supposing it to be [ \*547 ] material whether they were called the subjects, or the children of their father in Europe; lavish in professions of duty and affection, in return for the rich presents they received; so long as their actual independence was untouched, and their right to self-government acknowledged, they were willing to profess dependence on the power which furnished supplies of which they were in absolute need, and restrained dangerous intruders from entering their country; and this was probably the sense in which the term was understood by them.

Certain it is that our history furnishes no example, from the first settlement of our country, of any attempt, on the part of the crown, to interfere with the internal affairs of the Indians, further than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only.

The general views of Great Britain, with regard to the Indians, were detailed by Mr. Stuart, superintendent of Indian affairs, in a speech delivered at Mobile, in presence of several persons of distinction, soon after the peace of 1763. Towards the conclusion, he says: "Lastly, I inform you that it is the king's order to all his governors and subjects, to treat Indians with justice and humanity, and to for-

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bear all encroachments on the territories allotted to them; accordingly, all individuals are prohibited from purchasing any of your lands; but, as you know that, as your white brethren cannot feed you when you visit them unless you give them ground to plant, it is expected that you will cede lands to the king for that purpose. But whenever you shall be pleased to surrender any of your territories to his Majesty, it must be done, for the future, at a public meeting of your nation, when the governors of the provinces, or the superintendent shall be present, and obtain the consent of all your people. The boundaries of your hunting-grounds will be accurately fixed, and no settlement permitted to be made upon them. As you may [ \*548 ] be assured that all treaties with your people will be faithfully kept, so it is expected that you, also, will be careful strictly to observe them."

The proclamation issued by the king of Great Britain, in 1763, soon after the ratification of the articles of peace, forbids the governors of any of the colonies to grant warrants of survey, or pass patents upon any lands whatever, which, not having been ceded to or purchased by us, (the king,) as aforesaid, are reserved to the said Indians, or any of them.

The proclamation proceeds: "and we do further declare it to be our royal will and pleasure, for the present, as aforesaid, to reserve, under our sovereignty, protection, and dominion, for the use of the said Indians, all the lands and territories lying to the westward of the sources of the rivers which fall into the sea, from the west and northwest as aforesaid; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained.

"And we do further strictly enjoin and require all persons whatever, who have, either wilfully or inadvertently, seated themselves upon any lands within the countries above described, or upon any other lands which, not having been ceded to or purchased by us, are still reserved to the said Indians, as aforesaid, forthwith to remove themselves from such settlements."

A proclamation, issued by Governor Gage, in 1772, contains the following passage: "Whereas many persons, contrary to the positive orders of the king, upon this subject, have undertaken to make settlements beyond the boundaries fixed by the treaties made with the Indian nations, which boundaries ought to serve as a barrier between the whites and the said nations; particularly on the Ouabache." The proclamation orders such persons to quit those countries without delay.

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Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted; she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she \*made treaties with them, [ \* 549 ] the obligation of which she acknowledged.

This was the settled state of things when the war of our Revolution commenced. The influence of our enemy was established; her resources enabled her to keep up that influence; and the colonists had much cause for the apprehension that the Indian nations would, as the allies of Great Britain, add their arms to hers. This, as was to be expected, became an object of great solicitude to congress. Far from advancing a claim to their lands, or asserting any right of dominion over them, congress resolved "that the securing and preserving the friendship of the Indian nations appears to be a subject of the utmost moment to these colonies."

The early journals of congress exhibit the most anxious desire to conciliate the Indian nations. Three Indian departments were established; and commissioners appointed in each, "to treat with the Indians in their respective departments, in the name and on the behalf of the United Colonies, in order to preserve peace and friendship with the said Indians, and to prevent their taking any part in the present commotions."

The most strenuous exertions were made to procure those supplies on which Indian friendships were supposed to depend; and every thing which might excite hostility was avoided.

The first treaty was made with the Delawares, in September, 1778.<sup>1</sup>

The language of equality in which it is drawn, evinces the temper with which the negotiation was undertaken, and the opinion which then prevailed in the United States.

"1. That all offences or acts of hostilities, by one or either of the contracting parties against the other, be mutually forgiven, and buried in the depth of oblivion, never more to be had in remembrance.

"2. That a perpetual peace and friendship shall, from henceforth, take place and subsist between the contracting parties aforesaid, through all succeeding generations; and if either of the parties are engaged in a just and necessary war, with any other nation or nations, that then each shall assist the other, in due proportion to

their abilities, till their enemies are brought to reasonable terms of accommodation," &c.

3. The third article stipulates, among other things, a free | \* 550 ] \* passage for the American troops through the Delaware nation, and engages that they shall be furnished with provisions and other necessaries at their value.

" For the better security of the peace and friendship now entered into by the contracting parties against all infractions of the same by the citizens of either party, to the prejudice of the other, neither party shall proceed to the infliction of punishments on the citizens of the other, otherwise than by securing the offender or offenders, by imprisonment, or any other competent means, till a fair and impartial trial can be had by judges or juries of both parties, as near as can be to the laws, customs, and usages of the contracting parties, and natural justice," &c.

5. The fifth article regulates the trade between the contracting parties, in a manner entirely equal.

6. The sixth article is entitled to peculiar attention, as it contains a disclaimer of designs which were, at that time, ascribed to the United States, by their enemies, and from the imputation of which congress was then peculiarly anxious to free the government. It is in these words: " Whereas the enemies of the United States have endeavored, by every artifice in their power, to possess the Indians in general with an opinion that it is the design of the States aforesaid to extirpate the Indians, and take possession of their country; to obviate such false suggestion, the United States do engage to guarantee to the aforesaid nation of Delawares, and their heirs, all their territorial rights, in the fullest and most ample manner, as it hath been bounded by former treaties, as long as the said Delaware nation shall abide by and hold fast the chain of friendship now entered into."

The parties further agree that other tribes, friendly to the interest of the United States, may be invited to form a State, whereof the Delaware nation shall be the heads, and have a representation in congress.

This treaty, in its language and in its provisions, is formed, as near as may be, on the model of treaties between the crowned heads of Europe.

The sixth article shows how congress then treated the injurious calumny of cherishing designs unfriendly to the political and civil rights of the Indians.

[ \* 551 ] \* During the war of the Revolution, the Cherokees took part with the British. After its termination, the United States, though desirous of peace, did not feel its necessity so strongly

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as while the war continued. Their political situation being changed, they might very well think it advisable to assume a higher tone, and to impress on the Cherokees the same respect for congress which was before felt for the king of Great Britain. This may account for the language of the treaty of Hopewell.<sup>1</sup> There is the more reason for supposing that the Cherokee chiefs were not very critical judges of the language, from the fact that every one makes his mark; no chief was capable of signing his name. It is probable the treaty was interpreted to them.

The treaty is introduced with the declaration, that "the commissioners plenipotentiary of the United States give peace to all the Cherokees, and receive them into the favor and protection of the United States of America, on the following conditions."

When the United States gave peace, did they not also receive it? Were not both parties desirous of it? If we consult the history of the day, does it not inform us that the United States were at least as anxious to obtain it as the Cherokees? We may ask, further: did the Cherokees come to the seat of the American government to solicit peace; or, did the American commissioners go to them to obtain it? The treaty was made at Hopewell, not at New York. The word "give," then, has no real importance attached to it.

The first and second articles stipulate for the mutual restoration of prisoners, and are of course equal.

The third article acknowledges the Cherokees to be under the protection of the United States of America, and of no other power.

This stipulation is found in Indian treaties, generally. It was introduced into their treaties with Great Britain; and may probably be found in those with other European powers. Its origin may be traced to the nature of their connection with those powers; and its true meaning is discerned in their relative situation.

The general law of European sovereigns, respecting their claims in America, limited the intercourse of Indians, in \* a [ \* 552 ] great degree, to the particular potentate whose ultimate right of domain was acknowledged by the others. This was the general state of things in time of peace. It was sometimes changed in war. The consequence was, that their supplies were derived chiefly from that nation, and their trade confined to it. Goods, indispensable to their comfort, in the shape of presents, were received from the same hand. What was of still more importance, the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their country, from encroachments on

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their lands, and from those acts of violence which were often attended by reciprocal murder. The Indians perceived in this protection only what was beneficial to themselves—an engagement to punish aggressions on them. It involved, practically, no claim to their lands, no dominion over their persons. It merely bound the nation to the British crown, as a dependent ally, claiming the protection of a powerful friend and neighbor, and receiving the advantages of that protection, without involving a surrender of their national character.

This is the true meaning of the stipulation, and is undoubtedly the sense in which it was made. Neither the British government, nor the Cherokees, ever understood it otherwise.

The same stipulation entered into with the United States, is undoubtedly to be construed in the same manner. They receive the Cherokee nation into their favor and protection. The Cherokees acknowledge themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected. The manner in which this stipulation was understood by the American government, is explained by the language and acts of our first President.

The fourth article draws the boundary between the Indians and the citizens of the United States. But, in describing this boundary, the term "allotted" and the term "hunting-ground" are used.

It is reasonable to suppose, that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language, should distinguish the word "allotted" from

the words "marked out." The actual subject of contract [ \* 553 ] was the dividing line between the two nations, \* and their attention may very well be supposed to have been confined to that subject. When, in fact, they were ceding lands to the United States, and describing the extent of their cession, it may very well be supposed that they might not understand the term employed, a. indicating that, instead of granting, they were receiving lands. If the term would admit of no other signification, which is not conceded, its being misunderstood is so apparent, results so necessarily from the whole transaction, that it must, we think, be taken in the sense in which it was most obviously used.

So with respect to the words "hunting-grounds." Hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed that any intention existed of restricting the full use of the lands they reserved.

To the United States, it could be a matter of no concern, whether their whole territory was devoted to hunting-grounds, or whether an

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occasional village, and an occasional cornfield, interrupted, and gave some variety to the scene.

These terms had been used in their treaties with Great Britain, and had never been misunderstood. They had never been supposed to imply a right in the British government to take their lands, or to interfere with their internal government.

The 5th article withdraws the protection of the United States from any citizen who has settled or shall settle on the lands allotted to the Indians for their hunting-grounds; and stipulates that, if he shall not remove within six months, the Indians may punish him.

The 6th and 7th articles stipulate for the punishment of the citizens of either country, who may commit offences on or against the citizens of the other. The only inference to be drawn from them is, that the United States considered the Cherokees as a nation.

The 9th article is in these words: "For the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States, in congress assembled, shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs, as they think proper."

To construe the expression "managing all their affairs," \* into a surrender of self-government, would be, we think, a [ \* 554 ] perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them. The great subject of the article is the Indian trade. The influence it gave made it desirable that congress should possess it. The commissioners brought forward the claim, with the profession that their motive was "the benefit and comfort of the Indians, and the prevention of injuries or oppressions." This may be true, as respects the regulation of their trade, and as respects the regulation of all affairs connected with their trade, but cannot be true as respects the management of all their affairs. The most important of these are the cession of their lands, and security against intruders on them. Is it credible, that they should have considered themselves as surrendering to the United States the right to dictate their future cessions, and the terms on which they should be made? or to compel their submission to the violence of disorderly and licentious intruders? It is equally inconceivable that they could have supposed themselves, by a phrase thus slipped into an article, on another and most interesting subject, to have divested themselves of the right of self-government on subjects not connected with trade. Such a measure could not be "for their benefit and comfort," or for "the prevention of injuries and oppression." Such a construction would be inconsistent with the spirit of

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this and of all subsequent treaties; especially of those articles which recognize the right of the Cherokees to declare hostilities, and to make war. It would convert a treaty of peace covertly into an act annihilating the political existence of one of the parties. Had such a result been intended, it would have been openly avowed.

This treaty contains a few terms capable of being used in a sense which could not have been intended at the time, and which is inconsistent with the practical construction which has always been put on them; but its essential articles treat the Cherokees as a nation capable of maintaining the relations of peace and war, and ascertain the boundaries between them and the United States.

The treaty of Hopewell seems not to have established a solid peace. To accommodate the differences still existing between the State of Georgia and the Cherokee nation, the treaty of [ \* 555 ] \* Holston was negotiated, in July, 1791.<sup>1</sup> The existing constitution of the United States had been then adopted, and the government, having more intrinsic capacity to enforce its just claims, was, perhaps, less mindful of high-sounding expressions, denoting superiority. We hear no more of giving peace to the Cherokees. The mutual desire of establishing permanent peace and friendship, and of removing all causes of war, is honestly avowed; and, in pursuance of this desire, the 1st article declares, that there shall be perpetual peace and friendship between all the citizens of the United States of America and all the individuals composing the Cherokee nation.

The 2d article repeats the important acknowledgment, that the Cherokee nation is under the protection of the United States of America, and of no other sovereign whosoever.

The meaning of this has been already explained. The Indian nations were, from their situation, necessarily dependent on some foreign potentate for the supply of their essential wants, and for their protection from lawless and injurious intrusions into their country. That power was naturally termed their protector. They had been arranged under the protection of Great Britain; but the extinguishment of the British power in their neighborhood, and the establishment of that of the United States in its place, led naturally to the declaration, on the part of the Cherokees, that they were under the protection of the United States, and of no other power. They assumed the relation with the United States which had before subsisted with Great Britain.

This relation was that of a nation claiming and receiving the pro-

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tection of one more powerful, not that of individuals abandoning their national character, and submitting as subjects to the laws of a master.

The 3d article contains a perfectly equal stipulation for the surrender of prisoners.

The 4th article declares that "the boundary between the United States and the Cherokee nation shall be as follows: beginning," &c. We hear no more of "allotments," or of "hunting-grounds." A boundary is described, between nation and nation, by mutual consent. The national character of each, the ability of each to establish this boundary, is acknowledged by the other. To preclude forever all disputes, it is agreed \*that it shall be plainly [ \*556 ] marked by commissioners, to be appointed by each party; and, in order to extinguish forever all claim of the Cherokees to the ceded lands, an additional consideration is to be paid by the United States. For this additional consideration, the Cherokees release all right to the ceded land forever.

By the 5th article, the Cherokees allow the United States a road through their country, and the navigation of the Tennessee River. The acceptance of these cessions is an acknowledgment of the right of the Cherokees to make or withhold them.

By the 6th article, it is agreed, on the part of the Cherokees, that the United States shall have the sole and exclusive right of regulating their trade. No claim is made to the management of all their affairs. This stipulation has already been explained. The observation may be repeated, that the stipulation is itself an admission of their right to make or refuse it.

By the 7th article, the United States solemnly guarantee to the Cherokee nation all their lands not hereby ceded.

The 8th article relinquishes to the Cherokees any citizens of the United States who may settle on their lands; and the 9th forbids any citizen of the United States to hunt on their lands, or to enter their country without a passport.

The remaining articles are equal, and contain stipulations which could be made only with a nation admitted to be capable of governing itself.

This treaty, thus explicitly recognizing the national character of the Cherokees, and their right of self-government; thus guaranteeing their lands, assuming the duty of protection, and of course pledging the faith of the United States for that protection, has been frequently renewed, and is now in full force.

To the general pledge of protection have been added several specific pledges, deemed valuable by the Indians. Some of these restrain

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the citizens of the United States from encroachments on the Cherokee country, and provide for the punishment of intruders.

From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest \* 557 ] \* a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.

In 1819, congress passed an act<sup>1</sup> for promoting those humane designs of civilizing the neighboring Indians, which had long been cherished by the executive. It enacts, "that, for the purpose of providing against the further decline and final extinction of the Indian tribes adjoining to the frontier settlements of the United States, and for introducing among them the habits and arts of civilization, the President of the United States shall be, and he is hereby authorized, in every case where he shall judge improvement in the habits and condition of such Indians practicable, and that the means of instruction can be introduced with their own consent, to employ capable persons, of good moral character, to instruct them in the mode of agriculture suited to their situation; and for teaching their children in reading, writing, and arithmetic; and for performing such other duties as may be enjoined, according to such instructions and rules as the President may give and prescribe for the regulation of their conduct in the discharge of their duties."

This act avowedly contemplates the preservation of the Indian nations as an object sought by the United States, and proposes to effect this object by civilizing and converting them from hunters into agriculturists. Though the Cherokees had already made considerable progress in this improvement, it cannot be doubted that the general words of the act comprehend them. Their advance in the "habits and arts of civilization," rather encouraged perseverance in the laudable exertions still further to meliorate their condition. This act furnishes strong additional evidence of a settled purpose to fix the Indians in their country by giving them security at home.

The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States; and provide that all intercourse with them shall be carried on exclusively by the government of the Union.

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<sup>1</sup> 8 Stats. at Large, 516.

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\* Is this the rightful exercise of power, or is it usurpation ? [ \* 558 ]

While these States were colonies, this power, in its utmost extent, was admitted to reside in the crown. When our revolutionary struggle commenced, congress was composed of an assemblage of deputies acting under specific powers, granted by the legislatures, or conventions of the several colonies. It was a great popular movement, not perfectly organized ; nor were the respective powers of those who were entrusted with the management of affairs accurately defined. The necessities of our situation produced a general conviction that those measures which concerned all, must be transacted by a body in which the representatives of all were assembled, and which could command the confidence of all : congress, therefore, was considered as invested with all the powers of war and peace, and congress dissolved our connection with the mother country, and declared these united colonies to be independent States. Without any written definition of powers, they employed diplomatic agents to represent the United States at the several courts of Europe ; offered to negotiate treaties with them, and did actually negotiate treaties with France. From the same necessity, and on the same principles, congress assumed the management of Indian affairs ; first in the name of these united colonies ; and afterwards, in the name of the United States. Early attempts were made at negotiation, and to regulate trade with them. These not proving successful, war was carried on under the direction, and with the forces of the United States ; and the efforts to make peace, by treaty, were earnest and incessant. The confederation found congress in the exercise of the same powers of peace and war, in our relations with Indian nations, as with those of Europe.

Such was the state of things when the confederation was adopted. That instrument surrendered the powers of peace and war to congress, and prohibited them to the States, respectively, unless a State be actually invaded, " or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of delay till the United States in congress assembled can be consulted." This instrument also gave the United States in congress assembled the sole and exclusive right of " regulating the trade and managing all the affairs with the Indians, not \* members of any of the [ \* 559 ] States : provided, that the legislative power of any State within its own limits be not infringed or violated."

The ambiguous phrases which follow the grant of power to the United States, were so construed by the States of North Carolina and Georgia as to annul the power itself. The discontents and con-

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fusion resulting from these conflicting claims, produced representations to congress, which were referred to a committee, who made their report in 1787. The report does not assent to the construction of the two States, but recommends an accommodation, by liberal cessions of territory, or by an admission, on their part, of the powers claimed by congress. The correct exposition of this article is rendered unnecessary by the adoption of our existing constitution. That instrument confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several States, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power, in the confederation, are discarded.

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well under-  
[ \* 560 ] stood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

Georgia, herself, has furnished conclusive evidence that her former opinions on this subject concurred with those entertained by her sister States, and by the government of the United States. Various acts of her legislature have been cited in the argument, including the contract of cession made in the year 1802, all tending to prove her acquiescence in the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent; that their territory was separated from that of any State within whose chartered limits they might reside, by a boundary line, established by

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treaties; that within their boundary, they possessed rights with which no State could interfere; and that the whole power of regulating the intercourse with them, was vested in the United States. A review of these acts, on the part of Georgia, would occupy too much time, and is the less necessary, because they have been accurately detailed in the argument at the bar. Her new series of laws, manifesting her abandonment of these opinions, appears to have commenced in December, 1828.

In opposition to this original right, possessed by the undisputed occupants of every country; to this recognition of that right, which is evidenced by our history, in every change through which we have passed; is placed the charters granted by the monarch of a distant and distinct region, parcelling out a territory in possession of others whom he could not remove, and did not attempt to remove, and the cession made of his claims by the treaty of peace.

The actual state of things at the time, and all history since, explain these charters; and the king of Great Britain, at the treaty of peace, could cede only what belonged to his crown. These newly asserted titles can derive no aid from the articles so often repeated in Indian treaties; extending to them first, the protection of Great Britain, and afterwards that of the United States. These articles are associated with others, recognizing their title to self-government. The very fact of repeated treaties with them recognizes it; and the settled doctrine \* of the law of nations is, that a weaker power does [ \* 561 ] not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. "Tributary and feudatory states," says Vattel, "do not thereby cease to be sovereign and independent states, so long as self-government and sovereign and independent authority are left in the administration of the state." At the present day, more than one state may be considered as holding its rights of self-government under the guarantee and protection of one or more allies.

The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties and with the acts of congress. The whole intercourse between the United States and this nation is, by our constitution and laws, vested in the government of the United States.

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The act of the State of Georgia, under which the plaintiff in error was prosecuted, is consequently void, and the judgment a nullity. Can this court revise and reverse it?

If the objection to the system of legislation lately adopted by the legislature of Georgia, in relation to the Cherokee nation, was confined to its extra-territorial operation, the objection, though complete, so far as respected mere right, would give this court no power over the subject. But it goes much further. If the review which has been taken be correct, and we think it is, the acts of Georgia are repugnant to the constitution, laws, and treaties of the United States.

They interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the Union.

[ \* 562 ] They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia, guarantee to them all the land within their boundary, solemnly pledge the faith of the United States to restrain their citizens from trespassing on it, and recognize the preexisting power of the nation to govern itself.

They are in equal hostility with the acts of congress for regulating this intercourse, and giving effect to the treaties.

The forcible seizure and abduction of the plaintiff in error, who was residing in the nation with its permission, and by authority of the President of the United States, is also a violation of the acts which authorize the chief magistrate to exercise this authority.

Will these powerful considerations avail the plaintiff in error? We think they will. He was seized and forcibly carried away, while under guardianship of treaties guaranteeing the country in which he resided, and taking it under the protection of the United States. He was seized while performing, under the sanction of the chief magistrate of the Union, those duties which the humane policy adopted by congress had recommended. He was apprehended, tried, and condemned under color of a law which has been shown to be repugnant to the constitution, laws, and treaties of the United States. Had a judgment liable to the same objections been rendered for property, none would question the jurisdiction of this court. It cannot be less clear when the judgment affects personal liberty, and inflicts disgraceful punishment, if punishment could disgrace when inflicted on innocence. The plaintiff in error is not less interested in the operation of this unconstitutional law than if it affected his property. He is not less entitled to the protection of the constitution, laws, and treaties of his country.

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This point has been elaborately argued, and, after deliberate consideration, decided, in the case of Cohens v. The Commonwealth of Virginia, 6 Wheat. 264.

It is the opinion of this court that the judgment of the superior court for the county of Gwinnett, in the State of Georgia, condemning Samuel A. Worcester to hard labor in the penitentiary of the State of Georgia for four years, was pronounced by that court under color of a law which is void, as being repugnant to the constitution, treaties, and laws of the \* United States, and [ \* 563 ] ought, therefore, to be reversed and annulled.

M'LEAN, J. As this case involves principles of the highest importance, and may lead to consequences which shall have an enduring influence on the institutions of this country, and as there are some points in the case on which I wish to state distinctly my opinion, I embrace the privilege of doing so.

With the decision just given I concur.

The plaintiff in error was indicted under a law of Georgia, "for residing in that part of the Cherokee nation attached, by the laws of said State, to the county of Gwinnett, without a license or permit from his excellency the governor of the State, or from any agent authorized by his excellency the governor to grant such permit or license, and without having taken the oath to support and defend the constitution and laws of the State of Georgia, and uprightly to demean himself as a citizen thereof."

On this indictment the defendant was arrested, and, on being arraigned before the superior court for Gwinnett county, he filed, in substance, the following plea :—

He admits that, on the 15th of July, 1831, he was, and still continued to be, a resident in the Cherokee nation; and that the crime, if any were committed, was committed at the town of New Echota, in said nation, out of the jurisdiction of the court; that he is a citizen of Vermont, and that he entered the Indian country in the capacity of a duly authorized missionary of the American Board of Commissioners for Foreign Missions, under the authority of the President of the United States, and has not since been required by him to leave it; that he was, at the time of his arrest, engaged in preaching the gospel to the Cherokee Indians, and in translating the sacred Scriptures into their language, with the permission and approval of the Cherokee nation, and in accordance with the humane policy of the government of the United States, for the improvement of the Indians.

He then states, as a bar to the prosecution, certain treaties made

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[ \* 564 ] \* between the United States and the Cherokee Indians, by which the possession of the territory they now inhabit was solemnly guaranteed to them; and also a certain act of congress, passed in March, 1802, entitled "an act to regulate trade and intercourse with the Indian tribes." He also alleges that this subject, by the constitution of the United States, is exclusively vested in congress; and that the law of Georgia, being repugnant to the constitution of the United States, to the treaties referred to, and to the act of congress specified, is void, and cannot be enforced against him.

This plea was overruled by the court, and the defendant pleaded not guilty.

The jury returned a verdict of guilty, and the defendant was sentenced by the court to be kept in close custody by the sheriff of the county until he could be transported to the penitentiary of the State, and the keeper thereof was directed to receive him into custody, and keep him at hard labor in the penitentiary, during the term of four years.

Another individual was included in the same indictment, and joined in the plea to the jurisdiction of the court, and was also included in the sentence; but his name is not adverted to, because the principles of the case are fully presented in the above statement.

To reverse this judgment, a writ of error was obtained, which, having been returned with the record of the proceedings, is now before this court.

The first question which it becomes necessary to examine is whether the record has been duly certified, so as to bring the proceedings regularly before this tribunal.

A writ of error was allowed in this case by one of the justices of this court, and the requisite security taken. A citation was also issued, in the form prescribed, to the State of Georgia, a true copy of which, as appears by the oath of William Patten, was delivered to the governor, on the 24th day of November last, and another true copy was delivered, on the 22d day of the same month, to the attorney-general of the State.

The record was returned by the clerk, under the seal of the court, who certifies that it is a full and complete exemplification of the proceedings and judgment had in the case; and he further [ \* 565 ] \* certifies that the original bond, and a copy of the writ of error, were duly deposited and filed in the clerk's office of said court, on the 10th day of November last.

Is it necessary, in such a case, that the record should be certified by the judge who held the court?

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In the case of *Martin v. Hunter's Lessee*, which was a writ of error to the court of appeals of Virginia, it was objected that the return to the writ of error was defective, because the record was not so certified; but the court, in that case, said, "the forms of process, and the modes of proceeding in the exercise of jurisdiction, are, with few exceptions, left by the legislature to be regulated and changed as this court may, in its discretion, deem expedient." By a rule of this court, "the return of a copy of a record of the proper court, annexed to the writ of error, is declared to be a sufficient compliance with the mandate of the writ. The record, in this case, is duly certified by the clerk of the court of appeals, and annexed to the writ of error. The objection, therefore, which has been urged to the sufficiency of the return, cannot prevail." 1 Wheat. 304.

In 9 Wheat. 526, in the case of *Stewart v. Ingle and others*, which was a writ of error to the circuit court for the District of Columbia, a *certiorari* was issued, upon a suggestion of diminution in the record, which was returned by the clerk with another record; whereupon, a motion was made for a new *certiorari*, on the ground that the return ought to have been made by the judge of the court below, and not by the clerk. The writ of *certiorari*, it is known, like the writ of error, is directed to the court.

WASHINGTON, J., after consultation with the judges, stated that, according to the rules and practice of the court, a return made by the clerk was a sufficient return.

To ascertain what has been the general course of practice on this subject, an examination has been made into the manner in which records have been certified from state courts to this court; and it appears that, in the year 1817, six causes were certified, in obedience to writs of error, by the clerk, under the seal of the court. In the year 1819, two were so certified, one of them being the case of *M'Culloch v. The State of Maryland*, 4 Wheat. 316.

\* In the year 1821, three cases were so certified; and in the [ \* 566 ] year 1823, there was one. In 1827, there were five, and in the ensuing year, seven.

In the year 1830, there were eight causes so certified, in five of which a State was a party on the record. There were three causes thus certified in the year 1831, and five in the present year.

During the above periods, there were only fifteen causes from state courts, where the records were certified by the court or the presiding judge, and one of these was the case of *Cohens v. The State of Virginia*, 6 Wheat. 264.

This court adopted the following rule on this subject in 1797:—

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"It is ordered by the court, that the clerk of the court to which any writ of error shall be directed, may make the return of the same, by transmitting a true copy of the record, and of all proceedings in the cause, under his hand, and the seal of the court."

The power of the court to adopt this rule, cannot be questioned; and it seems to have regulated the practice ever since its adoption. In some cases, the certificate of the court, or the presiding judge, has been affixed to the record; but this court has decided, where the question has been raised, that such certificate is unnecessary.

So far as the authentication of the record is concerned, it is impossible to make a distinction between a civil and a criminal case. What may be sufficient to authenticate the proceedings in a civil case, must be equally so in a criminal one. The verity of the record is of as much importance in the one case as the other.

This is a question of practice; and it would seem that, if any one point in the practice of this court can be considered as settled, this one must be so considered.

In the progress of the investigation, the next inquiry which seems naturally to arise, is, whether this is a case in which a writ of error may be issued.

By the twenty-fifth section of the Judiciary Act of 1789, it is provided, "that a final judgment or decree in any suit in the highest court of law or equity of a State, in which a decision in [ \* 567 ] the suit could be had, where is drawn in question the \* validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the constitution, or of a treaty or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption, specially set up or claimed by either party, under such clause of the said constitution, treaty, statute, or commission, may be reexamined, and reversed or affirmed, in the supreme court of the United States."

Doubts have been expressed whether a writ of error to a state court is not limited to civil cases. These doubts could not have arisen from reading the above section. Is not a criminal case as much a suit as a civil case? What is a suit, but a prosecution? and can any one suppose that it was the intention of congress, in using the word suit, to make a distinction between a civil prosecution and a criminal one?

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It is more important that jurisdiction should be given to this court in criminal than in civil cases, under the 25th section of the Judiciary Act. Would it not be inconsistent, both with the spirit and letter of this law, to revise the judgment of a state court, in a matter of controversy respecting damages, where the decision is against a right asserted under the constitution or a law of the United States; but to deny the jurisdiction, in a case where the property, the character, the liberty and life of a citizen may be destroyed, though protected by the solemn guarantees of the constitution?

But this is not an open question; it has long since been settled by the solemn adjudications of this court. The above construction, therefore, is sustained, both on principle and authority. The provisions of the section apply as well to criminal as to civil cases, where the constitution, treaties, or laws of the United States come in conflict with the laws of a State; and the latter is sustained by the decision of the court.

It has been said, that this court can have no power to arrest \*the proceedings of a state tribunal in the enforcement [ \* 568 ] of the criminal laws of the State. This is undoubtedly true, so long as a state court, in the execution of its penal laws, shall not infringe upon the constitution of the United States, or some treaty or law of the Union.

Suppose a State should make it penal for an officer of the United States to discharge his duties within its jurisdiction; as, for instance, a land officer, an officer of the customs, or a postmaster, and punish the offender by confinement in the penitentiary; could not the supreme court of the United States interpose their power, and arrest or reverse the state proceedings? Cases of this kind are so palpable, that they need only to be stated to gain the assent of every judicious mind. And would not this be an interference with the administration of the criminal laws of a State?

This court have repeatedly decided, that they have no appellate jurisdiction in criminal cases from the circuit courts of the United States; writs of error and appeals are given from those courts only in civil cases. But, even in those courts, where the judges are divided on any point, in a criminal case, the point may be brought before this court, under a general provision in cases of division of opinion.

Jurisdiction is taken in the case under consideration exclusively by the provisions of the 25th section of the law which has been quoted. These provisions, as has been remarked, apply, indiscriminately, to criminal and civil cases, wherever a right is claimed under the con-

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stitution, treaties, or laws of the United States, and the decision by the state court is against such right. In the present case, the decision was against the right expressly set up by the defendant, and it was made by the highest judicial tribunal of Georgia.

To give jurisdiction in such a case, this court need look no further than to ascertain whether the right, thus asserted, was decided against by the state court. The case is clear of difficulty on this point.

The name of the State of Georgia is used in this case, because such was the designation given to the cause in the state court.

No one ever supposed that the State, in its sovereign [ \* 569 ] capacity, in such a case, is a party to the cause. The form of the prosecution here must be the same as it was in the state court; but so far as the name of the State is used, it is matter of form. Under a rule of this court, notice was given to the governor and attorney-general of the State, because it is a part of their duty to see that the laws of the State are executed.

In prosecutions for violations of the penal laws of the Union, the name of the United States is used in the same manner. Whether the prosecution be under a federal or state law, the defendant has a right to question the constitutionality of the law.

Can any doubt exist as to the power of congress to pass the law, under which jurisdiction is taken in this case? Since its passage, in 1789, it has been the law of the land, and has been sanctioned by an uninterrupted course of decisions in this court, and acquiesced in by the state tribunals, with perhaps a solitary exception; and whenever the attention of the national legislature has been called to the subject, their sanction has been given to the law by so large a majority as to approach almost to unanimity.

Of the policy of this act there can be as little doubt as of the right of congress to pass it.

The constitution of the United States was formed, not, in my opinion, as some have contended, by the people of the United States, nor, as others, by the States; but by a combined power, exercised by the people, through their delegates, limited in their sanctions to the respective States.

Had the constitution emanated from the people, and the States been referred to merely as convenient districts, by which the public expression could be ascertained, the popular vote throughout the Union would have been the only rule for the adoption of the constitution. This course was not pursued; and in this fact, it clearly appears that our fundamental law was not formed, exclusively, by the popular suffrage of the people.

The vote of the people was limited to the respective States in

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which they resided. So that it appears there was an expression of popular suffrage and state sanction, most happily united, in the adoption of the constitution of the Union.

Whatever differences of opinion may exist, as to the means \*by which the constitution was adopted, there would [ \* 570 ] seem to be no ground for any difference as to certain powers conferred by it.

Three coördinate branches of the government were established ; the executive, legislative, and judicial. These branches are essential to the existence of any free government, and that they should possess powers, in their respective spheres, coextensive with each other.

If the executive have not powers which will enable him to execute the functions of his office, the system is essentially defective ; as those duties must, in such case, be discharged by one of the other branches. This would destroy that balance which is admitted to be essential to the existence of free government, by the wisest and most enlightened statesmen of the present day.

It is not less important that the legislative power should be exercised by the appropriate branch of the government, than that the executive duties should devolve upon the proper functionary. And if the judicial power fall short of giving effect to the laws of the Union, the existence of the federal government is at an end.

It is in vain, and worse than in vain, that the national legislature enact laws, if those laws are to remain upon the statute book as monuments of the imbecility of the national power. It is in vain that the executive is called to superintend the execution of the laws, if he have no power to aid in their enforcement.

Such weakness and folly are in no degree chargeable to the distinguished men through whose instrumentality the constitution was formed. The powers given, it is true, are limited ; and no powers, which are not expressly given, can be exercised by the federal government ; but where given, they are supreme. Within the sphere allotted to them, the coördinate branches of the general government revolve, unobstructed by any legitimate exercise of power by the state governments. The powers exclusively given to the federal government are limitations upon the state authorities. But, with the exception of these limitations, the States are supreme ; and their sovereignty can be no more invaded by the action of the general government, than the action of the state governments can arrest or obstruct the course of the national power. \* It has been asserted [ \* 571 ] that the federal government is foreign to the state governments, and that it must consequently be hostile to them. Such an opinion could not have resulted from a thorough investigation of the

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great principles which lie at the foundation of our system. The federal government is neither foreign to the state governments, nor is it hostile to them. It proceeds from the same people, and is as much under their control as the state governments.

Where, by the constitution, the power of legislation is exclusively vested in congress, they legislate for the people of the Union, and their acts are as binding as are the constitutional enactments of a state legislature on the people of the State. If this were not so, the federal government would exist only in name. Instead of being the proudest monument of human wisdom and patriotism, it would be the frail memorial of the ignorance and mental imbecility of its framers.

In the discharge of his constitutional duties, the federal executive acts upon the people of the Union, the same as a governor of a State, in the performance of his duties, acts upon the people of the State. And the judicial power of the United States acts in the same manner on the people. It rests upon the same basis as the other departments of the government. The powers of each are derived from the same source, and are conferred by the same instrument. They have the same limitations and extent.

The supreme court of a State, when required to give effect to a statute of the State, will examine its constitution, which they are sworn to maintain, to see if the legislative act be repugnant to it; and if a repugnancy exist, the statute must yield to the paramount law.

The same principle governs the supreme tribunal of the Union. No one can deny, that the constitution of the United States is the supreme law of the land; and consequently, no act of any state legislature, or of congress, which is repugnant to it, can be of any validity.

Now, if an act of a state legislature be repugnant to the constitution of the State, the state court will declare it void; and if such act be repugnant to the constitution of the Union, or a law made under that constitution, which is declared to be the supreme [ \* 572 ] law of the land, is it not equally void? And, under \* such circumstances, if this court should shrink from a discharge of their duty, in giving effect to the supreme law of the land, would they not violate their oaths, prove traitors to the constitution, and forfeit all just claim to the public confidence?

It is sometimes objected, if the federal judiciary may declare an act of a state legislature void, because it is repugnant to the constitution of the United States, it places the legislation of a State within the power of this court. And might not the same argument be urged

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with equal force against the exercise of a similar power, by the supreme court of a State? Such an argument must end in the destruction of all constitutions; and the will of the legislature, like the acts of the parliament of Great Britain, must be the supreme, and only law of the land.

It is impossible to guard an investiture of power so that it may not, in some form, be abused; an argument, therefore, against the exercise of power, because it is liable to abuse, would go to the destruction of all governments.

The powers of this court are expressly, not constructively, given by the constitution; and within this delegation of power, this court are the supreme court of the people of the United States, and they are bound to discharge their duties, under the same responsibilities as the supreme court of a State; and are equally, within their powers, the supreme court of the people of each State.

When this court are required to enforce the laws of any State, they are governed by those laws. So closely do they adhere to this rule, that during the present term, a judgment of a circuit court of the United States, made in pursuance of decisions of this court, has been reversed and annulled, because it did not conform to the decisions of the state court, in giving a construction to a local law. But while this court conforms its decisions to those of the state courts, on all questions arising under the statutes and constitutions of the respective States, they are bound to revise and correct those decisions, if they annul, either the constitution of the United States, or the laws made under it.

It appears, then, that on all questions arising under the laws of a State, the decisions of the courts of such State form a rule for the decisions of this court, and that on all questions arising under the laws of the United States, the decisions of this court \* form a rule for the decisions of the state courts. Is there [ \* 573 ] any thing unreasonable in this? Have not the federal as well as the state courts, been constituted by the people? Why then should one tribunal, more than the other, be deemed hostile to the interests of the people?

In the 2d section of the 3d article of the constitution, it is declared, that "the judicial power shall extend to all cases, in law and equity, arising under the constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.

Having shown that a writ of error will lie in this case, and that the record has been duly certified, the next inquiry that arises is, what are the acts of the United States which relate to the Cherokee

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Indians and the acts of Georgia; and were these acts of the United States sanctioned by the federal constitution?

Among the enumerated powers of congress contained in the 8th section of the 1st article of the constitution, it is declared "that congress shall have power to regulate commerce with foreign nations and among the Indian tribes." By the articles of confederation, which were adopted on the 9th day of July, 1778, it was provided "that the United States, in congress assembled, shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States; fixing the standard of weights and measures throughout the United States; regulating the trade and management of all affairs with the Indians, not members of any of the States: Provided, that the legislative right of any State, within its own limits, be not infringed or violated."

As early as June, 1775, and before the adoption of the articles of confederation, congress took into their consideration the subject of Indian affairs. The Indian country was divided into three departments, and the superintendence of each was committed to commissioners, who were authorized to hold treaties with the Indians, make disbursements of money for their use, and to discharge various duties designed to preserve peace and cultivate a friendly feeling with them towards the colonies. No person was permitted to trade [ \* 574 ] with them \* without a license from one or more of the commissioners of the respective departments.

In April, 1776, it was "resolved, that the commissioners of Indian affairs in the middle department, or any one of them, be desired to employ, for reasonable salaries, a minister of the gospel, to reside among the Delaware Indians, and instruct them in the Christian religion; a schoolmaster, to teach their youth reading, writing, and arithmetic; also, a blacksmith, to do the work of the Indians." The general intercourse with the Indians continued to be managed under the superintendence of the continental congress.

On the 28th of November, 1785, the treaty of Hopewell was formed, which was the first treaty made with the Cherokee Indians. The commissioners of the United States were required to give notice to the executives of Virginia, North Carolina, South Carolina, and Georgia, in order that each might appoint one or more persons to attend the treaty, but they seem to have had no power to act on the occasion.

In this treaty, it is stipulated that "the commissioners plenipotentiary of the United States, in congress assembled, give peace to all the Cherokees, and receive them into the favor and protection of the United States of America, on the following conditions ."

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1. The Cherokees to restore all prisoners and property taken during the war.
2. The United States to restore to the Cherokees all prisoners.
3. The Cherokees acknowledge themselves to be under the protection of the United States, and of no other sovereign whatsoever.
4. The boundary line between the Cherokees and the citizens of the United States was agreed to as designated.
5. If any person, not being an Indian, intrude upon the land "allotted" to the Indians, or, being settled on it, shall refuse to remove within six months after the ratification of the treaty, he forfeits the protection of the United States, and the Indians were at liberty to punish him as they might think proper.
6. The Indians are bound to deliver up to the United States any Indian who shall commit robbery, or other capital crime, on a white person living within their protection.
- \*7. If the same offence be committed on an Indian by a [ \* 575 ] citizen of the United States, he is to be punished.

8. It is understood that the punishment of the innocent, under the idea of retaliation, is unjust, and shall not be practised on either side, except where there is a manifest violation of this treaty; and then it shall be preceded, first, by a demand of justice; and, if refused, then by a declaration of hostilities.

"That the Indians may have full confidence in the justice of the United States respecting their interests, they shall have a right to send a deputy of their choice, whenever they think fit, to congress."

The treaty of Holston was entered into with the same people, on the 2d day of July, 1791.

This was a treaty of peace, in which the Cherokees again placed themselves under the protection of the United States, and engaged to hold no treaty with any foreign power, individual State, or with individuals of any State. Prisoners were agreed to be delivered up on both sides; a new Indian boundary was fixed; and a cession of land made to the United States on the payment of a stipulated consideration.

A free, unmolested road, was agreed to be given through the Indian lands, and the free navigation of the Tennessee River. It was agreed that the United States should have the exclusive right of regulating their trade, and a solemn guarantee of their land, not ceded, was made. A similar provision was made, as to the punishment of offenders, and as to all persons who might enter the Indian territory, as was contained in the treaty of Hopewell. Also, that reprisal or retaliation shall not be committed, until satisfaction shall have been demanded of the aggressor.

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On the 7th day of August, 1786, an ordinance for the regulation of Indian affairs was adopted, which repealed the former system.

In 1794 another treaty<sup>1</sup> was made with the Cherokees, the object of which was to carry into effect the treaty of Holston. And on the plains of Tellico, on the 2d of October, 1798, the Cherokees, in another treaty,<sup>2</sup> agreed to give a right of way, in a certain direction, over their lands. Other engagements were also entered into which need not be referred to.

Various other treaties were made by the United States [ \* 576 ] with the Cherokee Indians, by which, among other arrangements, cessions of territory were procured and boundaries agreed on.

In a treaty made in 1817,<sup>3</sup> a distinct wish is expressed by the Cherokees, to assume a more regular form of government, in which they are encouraged by the United States. By a treaty held at Washington, on the 27th day of February, 1819, a reservation of land is made by the Cherokees for a school fund, which was to be surveyed and sold by the United States for that purpose. And it was agreed that all white persons who had intruded on the Indian lands should be removed.

To give effect to various treaties with this people, the power of the executive has frequently been exercised; and at one time General Washington expressed a firm determination to resort to military force to remove intruders from the Indian territories.

On the 30th of March, 1802, congress passed an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers.

In this act it is provided, that any citizen or resident in the United States, who shall enter into the Indian lands to hunt, or for any other purpose, without a license, shall be subject to a fine and imprisonment. And if any person shall attempt to survey, or actually survey, the Indian lands, he shall be liable to forfeit a sum not exceeding \$1,000, and be imprisoned not exceeding twelve months. No person is permitted to reside as a trader within the Indian boundaries, without a license or permit. All persons are prohibited, under a heavy penalty, from purchasing the Indian lands; and all such purchases are declared to be void. And it is made lawful for the military force of the United States to arrest offenders against the provisions of the act.

By the 19th section, it is provided that the act shall not be so construed as to "prevent any trade or intercourse with Indians living

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<sup>1</sup> 7 Stats. at Large, 43.

<sup>2</sup> Ib. 62.

<sup>3</sup> Ib. 156.

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on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual States; or the unmolested use of a road, from Washington district to Mero district, or to prevent the citizens of Tennessee from keeping in repair said road." Nor was the act to be so construed as to prevent persons from travelling from Knoxville to Price's settlement, \* provided they shall travel in the tract or path [ \* 577 ] which is usually travelled, and the Indians do not object; but if they object, then all travel on this road to be prohibited, after proclamation by the President, under the penalties provided in the act.

Several acts, having the same object in view, were passed prior to this one; but as they were repealed either before or by the act of 1802, their provisions need not be specially noticed.

The acts of the State of Georgia, which the plaintiff in error complains of, as being repugnant to the constitution, treaties, and laws of the United States, are found in two statutes.

The first act was passed the 12th of December, 1829, and is entitled "An act to add the territory lying within the chartered limits of Georgia, and now in the occupancy of the Cherokee Indians, to the counties of Carroll, Dekalb, Gwinnett, and Habersham, and to extend the laws of the State over the same, and to annul all laws made by the Cherokee nation of Indians, and to provide for the compensation of officers serving legal process in said territory, and to regulate the testimony of Indians, and to repeal the 9th section of the act of 1828 on this subject."

This act annexes the territory of the Indians, within the limits of Georgia, to the counties named in the title, and extends the jurisdiction of the State over it. It annuls the laws, ordinances, orders, and regulations, of any kind, made by the Cherokees, either in council or in any other way, and they are not permitted to be given in evidence in the courts of the State. By this law, no Indian, or the descendant of an Indian, residing within the Creek or Cherokee nation of Indians, shall be deenred a competent witness in any court of the State, to which a white person may be a party, except such white person reside within the nation. Offences under the act are to be punished by confinement in the penitentiary, in some cases not less than four nor more than six years, and in others not exceeding four years.

The second act was passed on the 22d day of December, 1830, and is entitled "An act to prevent the exercise of assumed and arbitrary power, by all persons, on pretext of authority from the Cherokee Indians and their laws; and to prevent white persons from

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[ \* 578 ] residing within that part of the \*chartered limits of Georgia occupied by the Cherokee Indians; and to provide a guard for the protection of the gold mines, and to enforce the laws of the State within the aforesaid territory."

By the 1st section of this act it is made a penitentiary offence, after the 1st day of February, 1831, for any person or persons, under color or pretence of authority from the said Cherokee tribe, or as headmen, chiefs, or warriors of said tribe, to cause or procure, by any means, the assembling of any council or other pretended legislative body of the said Indians, for the purpose of legislating, &c.

They are prohibited from making laws, holding courts of justice, or executing process. And all white persons, after the 1st of March, 1831, who shall reside within the limits of the Cherokee nation, without a license or permit from his excellency the governor, or from such agent as his excellency the governor shall authorize to grant such permit or license, or who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanor; and upon conviction thereof, shall be punished by confinement to the penitentiary at hard labor, for a term not less than four years. From this punishment, agents of the United States are excepted, white females, and male children under 21 years of age.

Persons who have obtained license, are required to take the following oath: "I, A B, do solemnly swear, that I will support and defend the constitution and laws of the State of Georgia, and uprightly demean myself as a citizen thereof. So help me God."

The governor is authorized to organize a guard, which shall not consist of more than 60 persons, to protect the mines in the Indian territory, and the guard is authorized to arrest all offenders under the act.

It is apparent that these laws are repugnant to the treaties with the Cherokee Indians which have been referred to, and to the law of 1802. This repugnance is made so clear by an exhibition of the respective acts, that no force of demonstration can make it more palpable.

By the treaties and laws of the United States, rights are guaranteed to the Cherokees, both as it respects their territory and [ \* 579 ] internal polity. By the laws of Georgia these rights \* are abolished, and not only abolished, but an ignominious punishment is inflicted on the Indians and others, for the exercise of them. The important question then arises, which shall stand, the laws of the United States or the laws of Georgia? No rule of construction, or subtlety of argument, can evade an answer to this ques-

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tion. The response must be, so far as the punishment of the plaintiff in error is concerned, in favor of the one or the other.

Not to feel the full weight of this momentous subject, would evidence an ignorance of that high responsibility which is devolved upon this tribunal, and upon its humblest member, in giving a decision in this case.

Are the treaties and law which have been cited, in force? and what, if any, obligations do they impose on the federal government within the limits of Georgia?

A reference has been made to the policy of the United States on the subject of Indian affairs, before the adoption of the constitution, with the view of ascertaining in what light the Indians have been considered by the first official acts in relation to them, by the United States. For this object, it might not be improper to notice how they were considered by the European inhabitants, who first formed settlements in this part of the continent of America.

The abstract right of every section of the human race to a reasonable portion of the soil, by which to acquire the means of subsistence, cannot be controverted. And it is equally clear, that the range of nations or tribes, who exist in the hunter state, may be restricted within reasonable limits. They shall not be permitted to roam, in the pursuit of game, over an extensive and rich country, whilst in other parts, human beings are crowded so closely together as to render the means of subsistence precarious. The law of nature, which is paramount to all other laws, gives the right to every nation, to the enjoyment of a reasonable extent of country, so as to derive the means of subsistence from the soil.

In this view, perhaps, our ancestors, when they first migrated to this country, might have taken possession of a limited extent of the domain, had they been sufficiently powerful, without negotiation or purchase from the native Indians. But this course is believed to have been nowhere taken. A more conciliatory [ \* 580 ] mode was preferred, and one which was better calculated to impress the Indians, who were then powerful, with a sense of the justice of their white neighbors. The occupancy of their lands was never assumed, except upon the basis of contract, and on the payment of a valuable consideration.

This policy has obtained, from the earliest white settlements in this country, down to the present time. Some cessions of territory may have been made by the Indians, in compliance with the terms on which peace was offered by the whites; but the soil thus taken, was taken by the laws of conquest, and always as an indemnity for the expenses of the war, commenced by the Indians.

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At no time has the sovereignty of the country been recognized as existing in the Indians, but they have been always admitted to possess many of the attributes of sovereignty. All the rights which belong to self-government have been recognized as vested in them. Their right of occupancy has never been questioned, but the fee in the soil has been considered in the government. This may be called the right to the ultimate domain, but the Indians have a present right of possession.

In some of the old States, Massachusetts, Connecticut, Rhode Island, and others, where small remnants of tribes remain, surrounded by white population, and who, by their reduced numbers, had lost the power of self-government, the laws of the State have been extended over them, for the protection of their persons and property.

Before the adoption of the constitution, the mode of treating with the Indians was various. After the formation of the confederacy, this subject was placed under the special superintendence of the united colonies; though, subsequent to that time, treaties may have been occasionally entered into between a State and the Indians in its neighborhood. It is not considered to be at all important to go into a minute inquiry on this subject.

By the constitution, the regulation of commerce among the Indian tribes is given to congress. This power must be considered as exclusively vested in congress, as the power to regulate commerce with foreign nations, to coin money, to establish post-offices, and to declare war. It is enumerated in the same section, and belongs to the same class of powers.  
[ \* 581 ]

This investiture of power has been exercised in the regulation of commerce with the Indians, sometimes by treaty, and, at other times, by enactments of congress. In this respect they have been placed by the federal authority, with but few exceptions, on the same footing as foreign nations.

It is said, that these treaties are nothing more than compacts, which cannot be considered as obligatory on the United States, from a want of power in the Indians to enter into them.

What is a treaty? The answer is, it is a compact formed between two nations or communities, having the right of self-government.

Is it essential that each party shall possess the same attributes of sovereignty, to give force to the treaty? This will not be pretended: for, on this ground, very few valid treaties could be formed. The only requisite is, that each of the contracting parties shall possess the right of self-government, and the power to perform the stipulations of the treaty.

Under the constitution, no State can enter into any treaty; and it

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is believed that, since its adoption, no State, under its own authority has held a treaty with the Indians.

It must be admitted, that the Indians sustain a peculiar relation to the United States. They do not constitute, as was decided at the last term, a foreign state, so as to claim the right to sue in the supreme court of the United States; and yet, having the right of self-government, they, in some sense, form a state. In the management of their internal concerns, they are dependent on no power. They punish offences under their own laws, and, in doing so, they are responsible to no earthly tribunal. They make war, and form treaties of peace. The exercise of these and other powers, gives to them a distinct character as a people, and constitutes them, in some respects, a state, although they may not be admitted to possess the right of soil.

By various treaties, the Cherokees have placed themselves under the protection of the United States; they have agreed to trade with no other people, nor to invoke the protection of any other sovereignty. But such engagements do not divest \*them [ \*582 ] of the right of self-government, nor destroy their capacity to enter into treaties or compacts.

Every state is more or less dependent on those which surround it; but, unless this dependence shall extend so far as to merge the political existence of the protected people into that of their protectors, they may still constitute a state. They may exercise the powers not relinquished, and bind themselves as a distinct and separate community.

The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. To contend that the word "allotted," in reference to the land guaranteed to the Indians in certain treaties, indicates a favor conferred, rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

The question may be asked, is no distinction to be made between a civilized and savage people? Are our Indians to be placed upon a footing with the nations of Europe, with whom we have made treaties?

The inquiry is not, what station shall now be given to the Indian tribes in our country? but, what relation have they sustained to us, since the commencement of our government?

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We have made treaties with them ; and are those treaties to be disregarded on our part, because they were entered into with an uncivilized people ? Does this lessen the obligation of such treaties ? By entering into them, have we not admitted the power of this people to bind themselves, and to impose obligations on us ?

The President and senate, except under the treaty-making power, cannot enter into compacts with the Indians, or with foreign nations. This power has been uniformly exercised in forming treaties with the Indians.

Nations differ from each other in condition, and that of [ \* 583 ] the same nation may change by the revolutions of \*time, but the principles of justice are the same. They rest upon a base which will remain beyond the endurance of time.

After a lapse of more than forty years since treaties with the Indians have been solemnly ratified by the general government, it is too late to deny their binding force. Have the numerous treaties which have been formed with them, and the ratifications by the President and senate, been nothing more than an idle pageantry ?

By numerous treaties with the Indian tribes, we have acquired accessions of territory, of incalculable value to the Union. Except by compact, we have not even claimed a right of way through the Indian lands. We have recognized in them the right to make war. No one has ever supposed that the Indians could commit treason against the United States. We have punished them for their violation of treaties ; but we have inflicted the punishment on them as a nation, and not on individual offenders among them as traitors.

In the executive, legislative, and judicial branches of our government, we have admitted, by the most solemn sanctions, the existence of the Indians as a separate and distinct people, and as being vested with rights which constitute them a state, or separate community—not a foreign, but a domestic community—not as belonging to the confederacy, but as existing within it, and, of necessity, bearing to it a peculiar relation.

But, can the treaties which have been referred to, and the law of 1802, be considered in force within the limits of the State of Georgia ?

In the act of cession, made by Georgia to the United States, in 1802, of all lands claimed by her west of the line designated, one of the conditions was, "that the United States should, at their own expense, extinguish, for the use of Georgia, as early as the same can be peaceably obtained, on reasonable terms, the Indian title to lands within the State of Georgia."

One of the counsel, in the argument, endeavored to show, that no

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part of the country now inhabited by the Cherokee Indians, is within what is called the chartered limits of Georgia.

It appears that the charter of Georgia was surrendered \* by the trustees, and that, like the State of South Carolina, [ \* 584 ] she became a regal colony. The effect of this change was, to authorize the crown to alter the boundaries, in the exercise of its discretion. Certain alterations, it seems, were subsequently made; but I do not conceive it can be of any importance to enter into a minute consideration of them. Under its charter, it may be observed, that Georgia derived a right to the soil, subject to the Indian title, by occupancy. By the act of cession, Georgia designated a certain line as the limit of that cession, and this line, unless subsequently altered, with the assent of the parties interested, must be considered as the boundary of the State of Georgia. This line having been thus recognized, cannot be contested on any question which may incidentally arise for judicial decision.

It is important, on this part of the case, to ascertain in what light Georgia has considered the Indian title to lands, generally, and particularly, within her own boundaries; and also, as to the right of the Indians to self-government.

In the first place, she was a party to all the treaties entered into between the United States and the Indians, since the adoption of the constitution. And prior to that period, she was represented in making them, and was bound by their provisions, although it is alleged that she remonstrated against the treaty of Hopewell. In the passage of the intercourse law of 1802, as one of the constituent parts of the Union, she was also a party.

The stipulation made in her act of cession, that the United States should extinguish the Indian title to lands within the State, was a distinct recognition of the right in the federal government, to make the extinguishment; and also, that, until it should be made, the right of occupancy would remain in the Indians.

In a law of the State of Georgia, "for opening the land-office and for other purposes," passed in 1783, it is declared that surveys made on Indian lands were null and void; a fine was inflicted on the person making the survey, which, if not paid by the offender, he was punished by imprisonment. By a subsequent act, a line was fixed for the Indians, which was a boundary between them and the whites. A similar provision is found in other laws of Georgia, passed before the adoption \* of the constitution. By an act [ \* 585 ] of 1787, severe corporeal punishment was inflicted on those who made or attempted to make surveys, "beyond the temporary line designating the Indian hunting-ground."

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On the 19th of November, 1814, the following resolutions were adopted by the Georgia legislature :—

“Whereas, many of the citizens of this State, without regard to existing treaties between the friendly Indians and the United States, and contrary to the interest and good policy of this State, have gone, and are frequently going over, and settling and cultivating the lands allotted to the friendly Indians for their hunting-ground, by which means the State is not only deprived of their services in the army, but considerable feuds are engendered between us and our friendly neighboring Indians :—

“Resolved, therefore, by the senate and house of representatives of the State of Georgia in general assembly met, that his excellency the governor be and is hereby requested to take the necessary means to have all intruders removed off the Indian lands, and that proper steps be taken to prevent future aggressions.”

In 1817, the legislature refused to take any steps to dispose of lands acquired by treaty with the Indians, until the treaty had been ratified by the senate, and, by a resolution, the governor was directed to have the line run between the State of Georgia and the Indians, according to the late treaty. The same thing was again done in the year 1819, under a recent treaty.

In a memorial to the President of the United States, by the legislature of Georgia, in 1819, they say, “it has long been the desire of Georgia, that her settlements should be extended to her ultimate limits.” “That the soil within her boundaries should be subjected to her control, and that her police organization and government should be fixed and permanent.” “That the State of Georgia claims a right to the jurisdiction and soil of the territory within her limits.” “She admits, however, that the right is inchoate, remaining to be perfected by the United States, in the extinction of the Indian title; the United States *pro hac vice* as their agents.”

The Indian title was also distinctly acknowledged by the [ \* 586 ] act \* of 1796, repealing the Yazoo act. It is there declared, in reference to certain lands, that “they are the sole property of the State, subject only to the right of the treaty of the United States, to enable the State to purchase under its preëmption right, the Indian title to the same;” and also that the land is vested in the “State, to whom the right of preëmption to the same belongs, subject only to the controlling power of the United States, to authorize any treaties for, and to superintend the same.” This language, it will be observed, was used long before the act of cession.

On the 25th of March, 1825, the governor of Georgia issued the following proclamation :—

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"Whereas it is provided in said treaty that the United States shall protect the Indians against the incroachments, hostilities, and impositions of the whites, so that they suffer no imposition, molestation, or injury in their persons, goods, effects, their dwellings, or the lands they occupy, until their removal shall have been accomplished, according to the terms of the treaty" which had been recently made with the Indians;

"I have therefore thought proper to issue this my proclamation warning all persons, citizens of Georgia or others, against trespassing or intruding upon lands occupied by the Indians, within the limits of Georgia, either for the purpose of settlement or otherwise, as every such act will be in direct violation of the provisions of the treaty aforesaid, and will expose the aggressors to the most certain and summary punishment, by the authorities of the State and the United States." "All good citizens, therefore, pursuing the dictates of good faith, will unite in enforcing the obligations of the treaty, as the supreme law," &c.

Many other references might be made to the public acts of the State of Georgia, to show that she admitted the obligation of Indian treaties, but the above are believed to be sufficient. These acts do honor to the character of that highly respectable State.

Under the act of cession, the United States were bound, in good faith, to extinguish the Indian title to lands within the limits of Georgia, so soon as it could be done peaceably and on reasonable terms.

\* The State of Georgia has repeatedly remonstrated to [ \*587 ] the President on this subject, and called upon the government to take the necessary steps to fulfil its engagement. She complained that whilst the Indian title to immense tracts of country had been extinguished elsewhere, within the limits of Georgia, but little progress had been made; and this was attributed, either to a want of effort on the part of the federal government, or to the effect of its policy towards the Indians. In one or more of the treaties, titles in fee-simple were given to the Indians, to certain reservations of land; and this was complained of, by Georgia, as a direct infraction of the condition of the cession. It has also been asserted that the policy of the government, in advancing the cause of civilization among the Cherokees, and inducing them to assume the forms of a regular government and of civilized life, was calculated to increase their attachment to the soil they inhabit, and to render the purchase of their title more difficult, if not impracticable.

A full investigation of this subject may not be considered as strictly within the scope of the judicial inquiry which belongs to the

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present case. But, to some extent, it has a direct bearing on the question before the court, as it tends to show how the rights and powers of Georgia were construed by her public functionaries.

By the first President of the United States, and by every succeeding one, a strong solicitude has been expressed for the civilization of the Indians. Through the agency of the government, they have been partially induced, in some parts of the Union, to change the hunter state for that of the agriculturist and herdsman.

In a letter addressed by Mr. Jefferson to the Cherokees, dated the 9th of January, 1809, he recommends them to adopt a regular government, that crimes might be punished and property protected. He points out the mode by which a council should be chosen, who should have power to enact laws; and he also recommended the appointment of judicial and executive agents, through whom the law might be enforced. The agent of the government, who resided among them, was recommended to be associated with their council, that he might give the necessary advice on all subjects relating to their government.

[ \* 588 ] \* In the treaty of 1817, the Cherokees are encouraged to adopt a regular form of government.

Since that time, a law has been passed making an annual appropriation of the sum of \$10,000, as a school fund, for the education of Indian youths, which has been distributed among the different tribes where schools had been established. Missionary labors among the Indians have also been sanctioned by the government, by granting permits to those who were disposed to engage in such a work, to reside in the Indian country.

That the means adopted by the general government to reclaim the savage from his erratic life, and induce him to assume the forms of civilization, have had a tendency to increase the attachment of the Cherokees to the country they now inhabit, is extremely probable; and that it increased the difficulty of purchasing their lands, as by act of cession the general government agreed to do, is equally probable.

Neither Georgia nor the United States, when the cession was made, contemplated that force should be used in the extinguishment of the Indian title; nor that it should be procured on terms that are not reasonable. But, may it not be said, with equal truth, that it was not contemplated by either party that any obstructions to the fulfilment of the compact should be allowed, much less sanctioned by the United States?

The humane policy of the government towards these children of the wilderness must afford pleasure to every benevolent feeling; and

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if the efforts made have not proved as successful as was anticipated, still, much has been done. Whether the advantages of this policy should not have been held out by the government to the Cherokees within the limits of Georgia, as an inducement for them to change their residence and fix it elsewhere, rather than by such means to increase their attachment to their present home, as has been insisted on, is a question which may be considered by another branch of the government. Such a course might, perhaps, have secured to the Cherokee Indians all the advantages they have realized from the paternal superintendence of the government, and have enabled it, on peaceable and reasonable terms, to comply with the act of cession.

Does the intercourse law of 1802 apply to the Indians who \* live within the limits of Georgia? The 19th section [ \* 589 ] of that act provides, "that it shall not be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual States? This provision, it has been supposed, excepts from the operation of the law the Indian lands which lie within any State. A moment's reflection will show that this construction is most clearly erroneous.

To constitute an exception to the provisions of this act, the Indian settlement, at the time of its passage, must have been surrounded by settlements of the citizens of the United States, and within the ordinary jurisdiction of a State; not only within the limits of a State, but within the common exercise of its jurisdiction.

No one will pretend that this was the situation of the Cherokees, who lived within the State of Georgia, in 1802; or, indeed, that such is their present situation. If, then, they are not embraced by the exception, all the provisions of the act of 1802 apply to them.

In the very section which contains the exception, it is provided that the use of the road from Washington district to Mero district should be enjoyed, and that the citizens of Tennessee, under the orders of the governor, might keep the road in repair. And, in the same section, the navigation of the Tennessee River is reserved, and a right to travel from Knoxville to Price's settlement, provided the Indians should not object.

Now, all these provisions relate to the Cherokee country; and, can it be supposed, by any one, that such provisions would have been made in the act, if congress had not considered it as applying to the Cherokee country, whether in the State of Georgia, or in the State of Tennessee?

The exception applied exclusively to those fragments of tribes

which are found in several of the States, and which came literally within the description used.

Much has been said against the existence of an independent power within a sovereign State; and the conclusion has been drawn that the Indians, as a matter of right, cannot enforce their own laws within the territorial limits of a State. The refutation of this argument is found in our past history.

[ \* 590 ] \*That fragments of tribes, having lost the power of self-government, and who lived within the ordinary jurisdiction of a State, have been taken under the protection of the laws, has already been admitted. But there has been no instance where the state laws have been generally extended over a numerous tribe of Indians, living within the State, and exercising the right of self-government, until recently.

Has Georgia ever, before her late laws, attempted to regulate the Indian communities within her limits? It is true, New York extended her criminal laws over the remains of the tribes within that State, more for their protection than for any other purpose. These tribes were few in number, and were surrounded by a white population. But, even the State of New York has never asserted the power, it is believed, to regulate their concerns beyond the suppression of crime.

Might not the same objection to this interior independent power, by Georgia, have been urged, with as much force as at present, ever since the adoption of the constitution? Her chartered limits, to the extent claimed, embraced a great number of different nations of Indians, all of whom were governed by their own laws, and were amenable only to them. Has not this been the condition of the Indians within Tennessee, Ohio, and other States?

The exercise of this independent power surely does not become more objectionable, as it assumes the basis of justice and the forms of civilization. Would it not be a singular argument to admit that, so long as the Indians govern by the rifle and the tomahawk, their government may be tolerated; but that it must be suppressed as soon as it shall be administered upon the enlightened principles of reason and justice?

Are not those nations of Indians who have made some advances in civilization, better neighbors than those who are still in a savage state? And is not the principle as to their self-government, within the jurisdiction of a State, the same?

When Georgia sanctioned the constitution, and conferred on the national legislature the exclusive right to regulate commerce, or intercourse with the Indians, did she reserve the right to regulate inter-

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course with the Indians within her limits ? This will not be pretended. If such had been the construction of her own powers, would they not have been exercised ? \*Did her [ \* 591 ] senators object to the numerous treaties which have been formed with the different tribes, who lived within her acknowledged boundaries ? Why did she apply to the executive of the Union repeatedly, to have the Indian title extinguished ; to establish a line between the Indians and the State ; and to procure a right of way through the Indian lands ?

The residence of Indians, governed by their own laws, within the limits of a State, has never been deemed incompatible with state sovereignty, until recently. And yet, this has been the condition of many distinct tribes of Indians, since the foundation of the federal government.

How is the question varied by the residence of the Indians in a territory of the United States ? Are not the United States sovereign within their territories ? And has it ever been conceived by any one that the Indian governments, which exist in the territories, are incompatible with the sovereignty of the Union ?

A State claims the right of sovereignty, commensurate with her territory ; as the United States claim it, in their proper sphere, to the extent of the federal limits. This right or power, in some cases, may be exercised, but not in others. Should a hostile force invade the country, at its most remote boundary, it would become the duty of the general government to expel the invaders. But it would violate the solemn compacts with the Indians, without cause, to dispossess them of rights which they possess by nature, and have been uniformly acknowledged by the federal government.

Is it incompatible with state sovereignty to grant exclusive jurisdiction to the federal government over a number of acres of land, for military purposes ? Our forts and arsenals, though situated in the different States, are not within their jurisdiction.

Does not the constitution give to the United States as exclusive jurisdiction in regulating intercourse with the Indians, as has been given to them over any other subjects ? Is there any doubt as to this investiture of power ? Has it not been exercised by the federal government, ever since its formation, not only without objection, but under the express sanction of all the States ?

The power to dispose of the public domain is an attribute \*of sovereignty. Can the new States dispose of the lands [ \* 592 ] within their limits, which are owned by the federal government ? The power to tax is also an attribute of sovereignty ; but, can the new States tax the lands of the United States ? Have they

not bound themselves, by compact, not to tax the public lands, nor until five years after they shall have been sold? May they violate this compact, at discretion?

Why may not these powers be exercised by the respective States? The answer is, because they have parted with them expressly for the general good. Why may not a State coin money, issue bills of credit, enter into a treaty of alliance or confederation, or regulate commerce with foreign nations? Because these powers have been expressly and exclusively given to the federal government.

Has not the power been as expressly conferred on the federal government, to regulate intercourse with the Indians; and is it not as exclusively given as any of the powers above enumerated? There being no exception to the exercise of this power, it must operate on all communities of Indians exercising the right of self-government; and, consequently, include those who reside within the limits of a State, as well as others. Such has been the uniform construction of this power by the federal government, and of every state government, until the question was raised by the State of Georgia.

Under this clause of the constitution, no political jurisdiction over the Indians has been claimed or exercised. The restrictions imposed by the law of 1802, come strictly within the power to regulate trade; not as an incident, but as a part of the principal power. It is the same power, and is conferred in the same words, that has often been exercised in regulating trade with foreign countries. Embargoes have been imposed, laws of non-intercourse have been passed, and numerous acts, restrictive of trade, under the power to regulate commerce with foreign nations.

In the regulation of commerce with the Indians, congress have exercised a more limited power than has been exercised in reference to foreign countries. The law acts upon our own citizens, and not upon the Indians, the same as the laws referred to act upon our own citizens in their foreign commercial intercourse.

[ \* 593 ] \* It will scarcely be doubted by any one, that, so far as the

Indians, as distinct communities, have formed a connection with the federal government, by treaties; that such connection is political, and is equally binding on both parties. This cannot be questioned, except upon the ground that, in making these treaties, the federal government has transcended the treaty-making power. Such an objection, it is true, has been stated; but it is one of modern invention, which arises out of local circumstances; and is not only opposed to the uniform practice of the government, but also to the letter and spirit of the constitution.

But the inquiry may be made, is there no end to the exercise of

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this power over Indians within the limits of a State, by the general government? The answer is, that, in its nature, it must be limited by circumstances.

If a tribe of Indians shall become so degraded or reduced in numbers, as to lose the power of self-government, the protection of the local law, of necessity, must be extended over them. The point at which this exercise of power by a State would be proper, need not now be considered; if indeed it be a judicial question. Such a question does not seem to arise in this case. So long as treaties and laws remain in full force, and apply to Indian nations exercising the right of self-government, within the limits of a State, the judicial power can exercise no discretion in refusing to give effect to those laws, when questions arise under them, unless they shall be deemed unconstitutional.

The exercise of the power of self-government by the Indians, within a State, is undoubtedly contemplated to be temporary. This is shown by the settled policy of the government in the extinguishment of their title, and especially by the compact with the State of Georgia. It is a question, not of abstract right, but of public policy. I do not mean to say that the same moral rule which should regulate the affairs of private life, should not be regarded by communities or nations. But a sound national policy does require that the Indian tribes within our States should exchange their territories, upon equitable principles, or eventually consent to become amalgamated in our political communities.

At best, they can enjoy a very limited independence within \*the boundaries of a State, and such a residence [ \*594 ] must always subject them to encroachments from the settlements around them; and their existence within a State, as a separate and independent community, may seriously embarrass or obstruct the operation of the State laws. If, therefore, it would be inconsistent with the political welfare of the States, and the social advance of their citizens, that an independent and permanent power should exist within their limits, this power must give way to the greater power which surrounds it, or seek its exercise beyond the sphere of State authority.

This state of things can only be produced by a coöperation of the State and federal governments. The latter has the exclusive regulation of intercourse with the Indians; and so long as this power shall be exercised, it cannot be obstructed by the State. It is a power given by the constitution, and sanctioned by the most solemn acts of both the federal and state governments; consequently, it cannot be abrogated at the will of a State. It is one of the powers parted

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with by the States, and vested in the federal government. But if a contingency shall occur, which shall render the Indians who reside in a State incapable of self-government, either by moral degradation or a reduction of their numbers, it would undoubtedly be in the power of a state government to extend to them the *ægis* of its laws. Under such circumstances, the agency of the general government, of necessity, must cease.

But if it shall be the policy of the government to withdraw its protection from the Indians who reside within the limits of the respective States, and who not only claim the right of self-government, but have uniformly exercised it, the laws and treaties which impose duties and obligations on the general government should be abrogated by the powers competent to do so. So long as those laws and treaties exist, having been formed within the sphere of the federal powers, they must be respected and enforced by the appropriate organs of the federal government.

The plaintiff who prosecutes this writ of error, entered the Cherokee country, as it appears, with the express permission of the President, and under the protection of the treaties of the United States, and the law of 1802. He entered, not to corrupt the morals [ \* 595 ] of this people, nor to profit by their substance, but to \*teach them, by precept and example, the Christian religion. If he be unworthy of this sacred office ; if he had any other object than the one professed ; if he sought, by his influence, to counteract the humane policy of the federal government towards the Indians, and to embarrass its efforts to comply with its solemn engagement with Georgia ; though his sufferings be illegal, he is not a proper object of public sympathy.

It has been shown, that the treaties and laws referred to come within the due exercise of the constitutional powers of the federal government ; that they remain in full force, and consequently must be considered as the supreme laws of the land. These laws throw a shield over the Cherokee Indians. They guaranteed to them their rights of occupancy, of self-government, and the full enjoyment of those blessings which might be attained in their humble condition. But by the enactments of the State of Georgia, this shield is broken in pieces — the infant institutions of the Cherokees are abolished, and their laws annulled. Infamous punishment is denounced against them for the exercise of those rights which have been most solemnly guaranteed to them by the national faith.

Of these enactments, however, the plaintiff in error has no right to complain, nor can he question their validity, except in so far as they affect his interests. In this view, and in this view only, has it

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become necessary, in the present case, to consider the repugnancy of the laws of Georgia to those of the Union.

Of the justice or policy of these laws, it is not my province to speak; such considerations belonging to the legislature by whom they were passed. They have, no doubt, been enacted under a conviction of right, by a sovereign and independent State, and their policy may have been recommended by a sense of wrong under the compact. Thirty years have elapsed since the federal government engaged to extinguish the Indian title within the limits of Georgia. That she has strong ground of complaint arising from this delay, must be admitted; but such considerations are not involved in the present case; they belong to another branch of the government. We can look only to the law which defines our power, and marks out the path of our duty.

Under the administration of the laws of Georgia, a citizen of \*the United States has been deprived of his liberty; [ \* 596 ] and, claiming protection under the treaties and laws of the United States, he makes the question, as he has a right to make it, whether the laws of Georgia, under which he is now suffering an ignominious punishment, are not repugnant to the constitution of the United States, and the treaties and laws made under it. This repugnancy has been shown; and it remains only to say, what has before been often said by this tribunal, of the local laws of many of the States in this Union, that, being repugnant to the constitution of the United States, and to the laws made under it, they can have no force to divest the plaintiff in error of his property or liberty.

BALDWIN, J., dissented; stating that, in his opinion, the record was not properly returned upon the writ of error, and ought to have been returned by the state court, and not by the clerk of that court. As to the merits, he said his opinion remained the same as was expressed by him in the case of the Cherokee Nation *v.* The State of Georgia, (5 Pet. 1,) at the last term.

This cause came on to be heard on the transcript of the record from the superior court for the county of Gwinnett, in the State of Georgia, and was argued by counsel; on consideration whereof, it is the opinion of this court that the act of the legislature of the State of Georgia, upon which the indictment in this case is founded, is contrary to the constitution, treaties, and laws of the United States; and that the special plea in bar pleaded by the said Samuel A. Worcester, in manner aforesaid, and relying upon the constitution, treaties, and laws of the United States aforesaid, is a good bar

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and defence to the said indictment, by the said Samuel A. Worcester; and as such ought to have been allowed and admitted by the said superior court for the county of Gwinnett, in the State of Georgia, before which the said indictment was pending and tried; and that there was error in the said superior court of the State of Georgia, in overruling the plea so pleaded as aforesaid. It is therefore ordered and adjudged, that the judgment rendered in [ \* 597 ] \* the premises, by the said superior court of Georgia, upon the verdict upon the plea of not guilty afterwards pleaded by the said Samuel A. Worcester, whereby the said Samuel A. Worcester is sentenced to hard labor in the penitentiary of the State of Georgia, ought to be reversed and annulled. And this court proceeding to render such judgment as the said superior court of the State of Georgia should have rendered, it is further ordered and adjudged, that the said judgment of the said superior court be and hereby is reversed and annulled; and that judgment be and hereby is awarded, that the special plea in bar, so as aforesaid pleaded, is a good and sufficient plea in bar in law to the indictment aforesaid; and that all proceedings on the said indictment do for ever surcease; and that the said Samuel A. Worcester be, and hereby is henceforth dismissed therefrom, and that he go thereof quit without day. And that a special mandate do go from this court, to the said superior court, to carry this judgment into execution.

In the case of Butler, Plaintiff in Error, *v.* The State of Georgia, the same judgment was given by the court, and a special mandate was ordered from the court to the superior court of Gwinnett county, to carry the judgment into execution.

11 P. 102; 3 Wal. 407; 5 Wal. 787; 17 W. 242, 247; 19 W. 593; 8 O. 193-196.



NATHANIEL CRANE, Plaintiff in Error, *v.* THE LESSEE OF HENRY GAGE MORRIS *et al.*, and of JOHN JACOB ASTOR *et al.*, Defendant in Error.

6 P. 598.

A circuit court has no authority to order a peremptory nonsuit against the will of the plaintiff.

A recital of a lease in a deed of release operates as an estoppel, which works on the interest in the land, and binds not only the parties, but privies in blood, in estate and in law.

The probate of a deed by a witness before a magistrate, is entitled to more weight than mere evidence of the handwriting of a subscribing witness.

It is not error for a judge to decline to advise a jury concerning the relative weight of different parts of the evidence.

To the due execution of a power, a recital of or even an express reference to it, is not necessary; the intent to execute it is matter *in pais*, to be collected from all the circumstances.

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When *prima facie* or presumptive proof has been made, its character, as such, ought not to be disregarded, and the court has not a right to direct the jury to view it otherwise than in the aspect in which it is presented.

\* ERROR to the circuit court of the United States for the [ \* 599 ] southern district of New York, in an action of ejectment.

The title exhibited by the plaintiff on the trial, in the circuit court, was the same with that in the case of *Carver v. Jackson, ex dem. of Astor et al.*, 4 P. 1.

The material facts appear in the former report, (4 P. 1,) and are stated in the opinion of the court in this case.

*Beardsley and Hoffman*, for the plaintiff in error.

*Ogden and Wirt*, for the defendant.

\* STORY, J., delivered the opinion of the court. [ \* 608 ]

Many of the questions which have been discussed in this \* case arose in the suit of *Carver v. Jackson, ex dem. [ \* 609 ] of Astor, et al.*, 4 Pet. 1; which was founded upon the same title, and substantially upon the same evidence as is presented in the present record. As upon a deliberate review we are entirely satisfied with the opinion and judgment pronounced on that occasion, (which was, indeed, most thoroughly and anxiously considered,) we do not propose to go at large into the reasoning now; but to confine ourselves to the new grounds of argument, which have been so earnestly pressed upon the court, and to the instructions prayed and refused, or given by the circuit court to the prejudice of the plaintiff in error.

In the progress of the cause, after the plaintiff had given the evidence in support of his cause, the counsel for the defendant insisted, "that unless the deed, called the marriage settlement deed, which was given in evidence, was accompanied or preceded by a lease, the plaintiff could not recover in this action; that without a lease, the said deed could only operate as a bargain and sale, and the statute of uses could only execute the first use to the bargainees, Johanna Philipse and Beverley Robinson, who took the legal estate in the land, and that the plaintiff could not recover without producing the lease, or accounting for its non-production. And because no lease had been produced, and no evidence given to account for its non-production, the counsel for the defendant moved the circuit court to nonsuit the plaintiff; but the circuit court overruled the objection, and refused to grant the motion for a nonsuit; and decided that the plaintiff was entitled to recover without pro-

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ducing any lease, or accounting for its non-production, inasmuch as the recital in the release was evidence of such a lease having been executed ;" to which opinion and decision the defendant excepted. This constitutes the subject-matter of the first ground, now assigned for error on behalf of the defendant before this court.

It might be a sufficient answer to the motion for a nonsuit, to declare that the circuit court had no authority whatsoever to order a peremptory nonsuit against the will of the plaintiff. This point has been repeatedly settled by this court, and is not now open for controversy ; Doe d. Elmore *v.* Grymes, 1 Pet. 469 ; D'Wolf *v.* Rabaud,

1 Pet. 476. But independent of this ground, which would [ \* 610 ] be conclusive, there \* is another which seems equally so ;

and that is, that it called upon the court to decide upon the nature and effect of the whole evidence introduced in support of the plaintiff's case, part of which was necessarily of a presumptive nature, and capable of being urged with more or less effect to the jury. It is to be recollectcd that the marriage settlement deed was dated and purported to be executed in January, 1758, and was designed to operate as a conveyance by way of lease and release, and the sole object of the lease was to give effect to the release, as a common law conveyance, and not as a mere bargain and sale. It stated : " That in consideration of a marriage intended to be had and solemnized between the said Roger Morris and Mary Philipse, (two of the parties to the indenture,) and the settlement hereafter made by the said Roger Morris on the said Mary Philipse, and for and in consideration of the sum of five shillings, &c., &c., the said Mary Philipse hath granted, &c., and by these presents doth grant, &c., unto the said Johanna Philipse and Beverley Robinson, (the trustees under the settlement,) in their actual possession, now being by virtue of a bargain and sale to them thereof, made for one whole year, by indenture bearing date the day next before the day of the date of these presents, and by force of the statute for transferring of uses into possession, and to their heirs, all those several lots, &c., &c." The recital, therefore, explicitly admits the existence of the lease and the possession under it, and bound the parties, as well as those who as privies claim under them. It will be recollectcd also, that the trial of the present case was in June, 1830, upwards of seventy years after the date of the lease, which was confessedly an instrument of a fugitive and temporary nature, and intended to serve merely as a means of giving full operation to the release. Under such circumstances, if no other objection existed to the title, the lapse of time would alone be sufficient to justify a presumption of its due execution and loss, and non-production by the plaintiff, proper to be left

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to the jury; and thus justify the court in refusing a nonsuit. In the case of *Carver v. Jackson*, this court observed that such a recital of a lease in a release, may, under circumstances, be used as evidence even against strangers. Thus: "If the existence and loss of the lease be established by other evidence, then the \*re- [ \*611 ] cital is admissible as secondary proof in the absence of more perfect evidence, to establish the contents of the lease. And if the transaction be an ancient one, and the possession has been long held under such release, and is not otherwise to be accounted for, then the recital will, of itself, under such circumstances, materially fortify the presumption, from lapse of time and length of possession, of the original existence of the lease." In the present case, there was *prima facie* evidence of the due execution of the release, and evidence also of a possession, by Morris and his wife, of the premises in controversy, for many years afterwards, consistent with if not necessarily flowing from that instrument. Under such circumstances it would have been unjustifiable on the part of the circuit court to have directed a nonsuit, the effect of which would have been to have excluded the jury from weighing the whole evidence, even if the case had been against a party who was a stranger to the title.

But the defendant is in no just sense a stranger to the title. He claims in privity of estate by a title derived from the State of New York, whose sole title is founded upon that of Morris and his wife, and is subsequent to the release. The general rule of law is, that a recital of one deed in another binds the parties, and those who claim under them by matters subsequent. Technically speaking, such a recital operates as an estoppel, which works on the interest of the land, and binds parties and privies; privies in blood, privies in estate, and privies in law. Between such parties the original lease need not at any time be produced. The recital of it in the release is conclusive. It is not offered as secondary, but as primary proof; not as presumptive evidence, but as evidence operating by way of estoppel, which cannot be averred against, and forms a muniment of the title. It is otherwise where the recital is offered against strangers claiming by an adverse title, or by persons claiming from the same parties by a title anterior and paramount. In such cases the lease itself is the primary evidence; and its loss or non-production must be accounted for before the recital can be let in as secondary evidence of its execution or contents. But even here, (as has been already intimated,) a long lapse of time furnishes a reasonable presumption of the loss. The argument of the bar is, that the recital \*may [ \*612 ] be conclusive of the existence of the lease in favor of the

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lessees, but not for or against any other persons claiming under them by distinct conveyances. If the recital be conclusive in favor of the lessees, it must be equally conclusive in their favor as releasees, since the latter works upon the possession acquired under the lease. But in truth, the recital as an estoppel binds all privies, where claiming by the same or by a distinct instrument. It is the privity which constitutes the bar, and not the fact of taking by the very deed which contains the recital. It is also said that the recital of a lease in a release is competent evidence to prove that the lease was originally executed; but not until its non-production is accounted for competent evidence of the contents of the lease. If the recital of a lease be admitted to be good evidence of the execution, it must be good evidence of the execution of the very lease stated in the recital, and of the contents, so far as they are stated therein, for they constitute its identity. But the argument itself can apply only where the recital is offered as secondary evidence. In the present case it is offered, not as secondary, but as primary and conclusive.

This whole subject underwent a more elaborate consideration of this court in the case of *Carver v. Jackson*, and the doctrine now asserted was reasoned out, both upon principle and authority. The language of the court upon that occasion was: "We are of opinion not only that the recital of the lease in the deed of marriage settlement was evidence between these parties, (and the present defendant is in a similar predicament,) of the original existence of the lease, but that it was conclusive evidence between these parties of that original existence; and superseded the necessity of introducing any other evidence to establish it." And after a review of the authorities, it was added: "We think, then, that, upon authority, the recital of the lease in the deed of release, in the present case, was conclusive evidence upon all persons claiming under the parties in privity of estate as the present defendant in ejectment does claim. And independently of authority we should have arrived at the same result upon principle; for the recital constitutes a part of the title, and establishes a possession under the lease necessary to give the release its intended operation. It works upon the interest in [ \* 613 ] the land, and creates an \* estoppel, which runs with the land against all persons in privity under the releasees. It was as much a muniment of the title as any covenant therein running with the land." And it was then added: "This view of the matter dispenses with the necessity of examining all the other exceptions as to the nature and sufficiency of the proof of the original existence and loss of the 'ease, and of the secondary evidence to supply its place."

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In every view of the matter, then, the nonsuit was properly denied.

The next error assigned grows out of an instruction to the jury, asked of the courts by the counsel for the plaintiff. The prayer was, "that Roger Morris stood in the character of a grantee in the deed, (the settlement,) and that a possession of the deed by him is evidence of its delivery, because the settlement gave him a larger interest in the lands, than his mere marital rights." The court refused to give this instruction, and declared that, "strictly speaking, Morris could neither be considered as grantor or grantee in the settlement deed, and therefore the mere possession of the deed by him was no affirmative proof on either side, as to the fact of delivery;" to which opinion and decision the counsel for the defendant excepted. It is somewhat singular that the defendant should have excepted to the refusal to grant the prayer asked by the plaintiff, since the remarks made by the court seem to have been rather reasons for the refusal, than an instruction to the jury; and if those reasons were not well founded, it was no prejudice to the defendant. But waiving this consideration, let us see if the circuit court was wrong in stating that, strictly speaking, Morris could neither be considered as grantor or grantee in the settlement. The plaintiff contended that he was exclusively grantee, and the defendant's counsel now contend that he was exclusively grantor. This is a point which must be decided by an examination of the terms of the settlement deed. That a husband, even before marriage, may, in virtue of the marriage contract, have inchoate rights in the estate of his wife, which, if the marriage is consummated, will be protected by a court of equity against any antecedent contracts and conveyances secretly made by the wife in fraud of those marital rights, may be admitted; but they are mere \*equi- [ \*614 ] ties, and in no just sense constitute any legal or equitable estate in her lands or other property antecedent to the marriage. In the present settlement deed, which is by indenture tripartite, Mary Philipse purports to be the party of the first part, Roger Morris of the second part, and Johanna Philipse and Beverley Robinson (the trustees) of the third part. Mary Philipse alone, without any coöperation on the part of Morris, purports to grant and does grant to the trustees, all the land mentioned in the deed (including the premises in controversy) as her own property, upon certain uses specified in the *habendum*, and among others after the marriage, to the use of herself and her husband during their joint lives and the life of the survivor of them, with certain subsequent uses and powers, not material to be mentioned. If the settlement deed stopped here, the case would be too plain to admit of doubt. Mary Philipse must, in law, be deemed

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the sole grantor of the lands, and the trustees and Morris must be deemed grantees, and to take in that character exclusively. In the close of the indenture is the following clause : "And the said Roger Morris, for and in consideration of the premises, and the sum of five shillings, &c., doth hereby for himself, his heirs, executors, and administrators, covenant, promise, grant, and agree, to and with the said Johanna Philipse and Beverley Robinson, their and each of their heirs, &c., &c., that in case the said Mary Philipse shall survive him, the said Roger Morris, that then, and in such case, immediately after his death, all and singular the moneys and personal estate whatsoever, whereof he shall die possessed, shall be accounted the proper money and estate of the said Mary Philipse during her natural life, and after her decease, in case there be no issue begotten between the said Roger Morris and Mary Philipse, that then the said moneys and personal estate shall and may be had and taken by the executors and administrators of the said Roger Morris, &c.; but if such child or children shall survive the said Roger Morris and Mary Philipse, then the said moneys and estate to be divided among them in such shares and proportions as he, the said Roger Morris, shall think fit at any time hereafter, by his last will and testament, or otherwise, to order and direct." It is obvious from the language of this clause, that it can operate only by way of covenant. It conveys no present [ \*615 ] interest in \*any personal property whatsoever; and affects to dispose only of the moneys and personal estate of which Morris shall die possessed, at whatever time they may have been acquired. It leaves him at full liberty to dispose of all the personality that he shall at any time possess during his lifetime, *toties quoties*. As a grant, it would be utterly void from its uncertainty. As a covenant, it has a sensible and just operation in favor of the trustees. In legal contemplation, then, this clause makes Morris, strictly speaking, only a covenantor, and not a grantor. But as to the real estate passed to the trustees by the indenture, to which alone the instruction could properly apply, he was clearly a mere grantee. If, therefore, there was any error in the circuit court on this point, it was not an error prejudicial to the defendant, but to the plaintiff, as to its bearing on the question of the possession and delivery of the settlement deed. But looking to the whole provisions of that deed, it might well be stated, that, strictly speaking, Morris could neither be considered as grantor or grantee. He was not grantor in any sense, except as to the personality, and as to that, he was properly a covenantor. And, technically speaking, at the time of the execution of the deed, the trustees were the grantees in the deed, though by the operation of the statute of uses, the use to Morris, carved out of their seisin, drew

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to it the seisin and possession of the estate, as soon as that use, by his subsequent marriage, had a legal existence. Under such circumstances, the direction that the mere possession of the deed by Morris was no affirmative proof, on either side, of the fact of the delivery, was at least as favorable to the defendants as the law would justify; and consequently, he has nothing to complain of.

We now come to the instructions asked of the court by the counsel for the defendant. And, in the first place, it is argued, that the court erred in refusing to instruct the jury that "the evidence arising from the proof of the deed of William Livingston, in 1787, is no stronger than that arising from the proof of the handwriting and death of the subscribing witnesses." But this instruction, so asked, is not upon any matter of law, but upon the mere weight of evidence, which the court was not bound to give, and which was matter for the proper consideration of the jury. But if it had been

\* otherwise, we are not prepared to admit that the instruc- [ \*616 ]  
tion ought to have been given. The solemn probate of a  
deed by a witness upon oath before a magistrate, for the purpose of  
having it recorded, and the certificate of the magistrate of its due  
probate upon such testimony, are certainly entitled to more weight  
as evidence, than the mere unexplained proof of the handwriting of  
a witness after his death. The one affords only a presumption of  
the due execution of the deed from the mere fact that the signature  
of the witness is to the attestation clause; the other is a deliberate  
affirmation by the witness, upon oath, before a competent tribunal,  
of the material facts to prove the execution. And there were, in the  
present case, circumstances which gave an enhanced value and  
weight to this probate.

In the next place, it is argued that the court erred in refusing to give the instruction, "that in the absence of all proof, that the trustees, or any person for them, ever had the deed, and there being no proof of a holding under it, the fact that the deed came out of the hands of Morris, in 1787, is sufficient, of itself, to rebut any presumption of a delivery arising from the proof of the deed by William Livingston, or the proof of the handwriting and death of the subscribing witnesses." This instruction plainly called upon the court to decide mere matters of fact, which were in controversy before the jury, and upon the assumption of such matters of fact to direct the jury that they rebutted other matters of fact. It was no part of the duty of the court to decide upon the relative weight and force of these facts. They exclusively belonged to the jury; and the instruction was properly refused.

The same answer may be given to the refusal to give the instru-  
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tions prayed for in all the various branches embraced on the fourth instruction of the defendant. They are as follows: 1. "If the jury, upon the evidence, believe that the deed was signed and sealed on the day of its date, and that William Livingston and Sarah Williams witnessed what took place at that time, and that the deed was not delivered before the execution of the Beekman deed, on the 18th of January, 1758, then there is no evidence of a delivery." 2. "It being conceded by the plaintiff's counsel, that the deed was not delivered at the time of the execution of the Beekman deed, on the [ \*617 ] \*18th of January, 1758, then if the jury believe the deed was signed, sealed, and witnessed on the day it bears date, there is no evidence of a delivery." 3. "If the jury believe the deed was not delivered on the day it was signed, sealed, and witnessed, then there is no evidence of a delivery."

The supposed concession by the plaintiff's counsel, was utterly denied by them at the time; and of course was properly deemed by the court as out of the case. The whole scope of all these instructions was to call upon the court to decide, as matter of law, upon the evidence before the jury, what portion of it was or was not proof of a delivery of the deed, and how far certain supposed facts controlled, or might control the effect of all the other evidence upon the same point. There was positive evidence before the jury of the delivery of the deed, from the probate of it by Governor Livingston before Judge Hobart. How then could the court be called upon to say that there was no evidence? The circumstances alluded to, and hypothetically put in the instructions, were certainly proper to be left to the jury, if found by them to be true, to rebut this evidence. They were matter for comment and argument to the jury, by counsel, upon this vital question in the cause. But the court had no right to say that they would, or ought to overcome all other evidence in the case of the delivery of the deed. The jury were not to be told as matter of law, that if they found or believed one fact, there was no evidence of another independent fact; or because the deed was not delivered on a particular day, therefore there was no evidence of a delivery at all. They were to judge of the fact of delivery from all the circumstances of the case. It was their exclusive province; and it was no part of the duty of the court to instruct them, however it might advise them, in respect to the weight of conflicting evidence, or the inferences which they should deduce from one fact to decide their belief of another. These instructions were, therefore, properly refused; and, indeed, some of them are open to even more serious objections, as logical deductions upon mere matters of fact. The conclusions do not necessarily flow from the premises.

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The next objection is, that the court refused to instruct the jury that "in judging of the acts said to be hostile to the settlement deed, if they may determine with what intent these \*acts [ \*618 ] were done, they must gather that intent from the acts themselves." The refusal was not unqualified, for the court gave the instruction with the addition of the words "connected with the other evidence in the cause."

In our opinion, the instruction, without the qualification, was properly refused. In cases where the interests of third persons may be affected by the acts of others—where, as in the present case, the rights of children are to be affected by the acts of parents, it is most material to ascertain the intent with which these acts were done. The intent may restrain, enlarge, or explain the acts, so as to change their whole effect in point of evidence. The acts done with one intent may press strongly in point of presumption one way; with another intent, they may afford an equally cogent presumption the other way. How is this intent to be ascertained? It may, indeed, accompany and qualify the acts; but may, on the other hand, arise and be exclusively provable by extrinsic circumstances. Are these extrinsic circumstances to be shut out from the cause, if they are the sole means of demonstrating the intent? If not, upon what ground are they to be excluded, when they may confirm or qualify or repel any inferences of intent deducible, ordinarily, from the acts standing alone? No rule of evidence exists, which, in our judgment, could justify such a proceeding; and no authority has been cited, at the bar, in favor of its adoption. One of the grounds of argument at the bar is, that the hostile acts relied on arose from the execution of certain deeds of lease and release, the intent of which might be gathered from the contents of the writings. But the question was not what were the contents of these deeds, as matters of legal construction, but what was the intent with which they were made; or rather what was the estate out of which Morris and wife (the grantors) intended to carve them. Were they designed to be an execution of the powers and authority under the settlement deed? Or, if an excess of these powers, were they intended not to be hostile to the interests conferred by that deed? Or were they solely and designedly an exercise of the general rights of husband and wife over the estate of the latter, unfettered by any settlement? Their direct operation was not in controversy. They were introduced for a collateral purpose, as matters of presumption against the validity of the settlement \*deed as an executed conveyance. [ \*619 ] The intent, then, was open to proof as matter *in pais*; and all the evidence, legally conducing to establish it, was to be consid-

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ered by the jury in connection. But the instruction does not allude to any deeds whatsoever. It is in the most general terms, and speaks of acts which may as properly refer to any other thing done *in pais*, as to solemn conveyances. This subject was discussed very much at large in *Carver v. Jackson*, and the result to which the court arrived, was precisely the same as is now indicated.

The next objection is that the court refused to instruct the jury, that "although the deeds to Hill, Merrit, and Rhodes would in law be a good execution of the power contained in the settlement deed, supposing that to have been duly delivered; yet upon the question, whether that deed was or was not perfected by a delivery, these deeds contained evidence that the parties were acting as owners of the land in fee, and not as tenants for life executing a power." But the court gave the following instruction: that "although the deeds to Hill, Merrit, and Rhodes would in law be a good execution of the power contained in the settlement deed, supposing that to have been delivered, yet upon the question whether that deed was or was not perfected by delivery, those deeds are competent evidence from which the jury may judge whether Morris and his wife intended to act as if no marriage settlement had been executed, or under the power contained in the marriage settlement." To this instruction, so given, the defendant also excepted. The sole object of introducing the deeds to Hill, Merrit, and Rhodes here referred to, (which were introduced on the part of the defendant,) was to raise a presumption against the delivery of the settlement deed. The argument seems to have been, that although those deeds might have been a fit and good execution of the power reserved to Morris and his wife by the settlement deed, yet the omission to make any reference to that power, or to state in those deeds that they were acting under and in virtue of a power, was evidence that they were acting, not under any power, but as owners of the fee. If they were acting as owners of the fee, then that circumstance afforded, *pro tanto*, a presumption

against the delivery of the settlement deed; since parties [ \* 620 ] acting under and entitled to act \* solely under the power in that deed, would naturally refer to it as the foundation of their conveyances. Now, so far as the presumption would go, it was fairly and fully left to the jury as evidence, by the very instruction given to the court.

But the instruction which was refused, called upon the court to go further, and to decide as matter of law, that the parties were in fact acting as owners of the land in fee, and not as tenants for life, executing a power. Surely, it will not be pretended that in order to a due execution of a power, it is necessary that it should be recited or

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referred to in the executing instrument of conveyance. The form of the instruction prayed for admits this. It is sufficient that the power exists, and is intended to be executed; and that intent is matter *in pais*, to be collected from all the circumstances of the case. The deeds of Hill, Merrit, and Rhodes, contain nothing on their face (as the instruction prayed for concedes) which is inconsistent with or repugnant to the power of the settlement deed; and it demands of the court, notwithstanding, that in point of fact they were not executed under the power. This was matter of fact and intent, involved in the issue before the jury, and as such, exclusively for their decision. This very point underwent the most deliberate consideration of this court in the case of Carver *v.* Jackson, upon an exception taken to the charge of the court. It was then treated solely as a matter of fact, for the consideration of the jury; and from that view of it, we do not perceive the slightest reason to depart.

The next and last objection relied on is, that the court refused to instruct the jury that "the evidence upon the one side or the other should not be submitted to the jury as *prima facie* or presumptive evidence, either for or against a delivery; but the jury should consider and weigh the whole evidence together, and from the whole determine whether or not the deed was delivered." That the whole evidence was to be considered and weighed by the jury, upon the points in issue, was indisputable and undisputed. The only question was whether the defendant had a right to insist upon shutting out from a consideration of the jury the nature of the evidence, as *prima facie* proof, or otherwise, and to prescribe the order and manner in which it should be examined and weighed by them. We know of no principle of law upon which such a claim can be maintained. Whenever evidence is offered to the jury, which [ \* 621 ] is in its nature *prima facie* proof, or presumptive proof, its character, as such, ought not to be disregarded; and no court has a right to direct the jury to disregard it, or view it under a different aspect from that in which it is actually presented to them. Whatever just influence it may derive from that character, the jury have a right to give it; and in regard to the order in which they shall consider the evidence in a cause, and the manner in which they shall weigh it, the law has submitted it to them to decide for themselves; and any interference with this right, would be an invasion of their privilege to respond to matters of fact. The objection is, therefore, overruled.

Upon the whole, the opinion of the court is, that the judgment of the circuit court ought to be affirmed, with costs.

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BALDWIN, J., dissented in writing, but did not cause his opinion to be published.

6 P. 622; 14 H. 218; 23 H. 172; 1 Wal. 359; 5 Wal. 795; 7 O. 268.

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SAMUEL KELLY, a Citizen of New York, Plaintiff in Error, *v.* JAMES JACKSON, a Citizen of New Jersey, Defendant in Error, *ex dem.* HENRY GAGE MORRIS, MARIA MORRIS, THOMAS HINCKS, JOHN HINCKS, Aliens and British Subjects; JOHN JACOB ASTOR, THEODOSIUS FOWLER, CADWALLADER D. COLDEN, AND CORNELIUS L. BOGART, Citizens of New Jersey.

6 P. 622.

The court is not bound to repeat to the jury the same substantial proposition of law in different forms; it is sufficient if it be once laid down in an intelligible and unexceptionable manner.

If evidence be objected to generally, when admissible, for any purpose, it is not error to overrule the objection and admit the evidence; the party objecting should, in such a case, pray an instruction limiting the effect of the evidence to the specific purpose for which it is admissible.

*Prima facie* evidence of a fact, is such as, in judgment of law, is sufficient to establish the fact; in the absence of all controlling or discrediting evidence, it is conclusive, and the jury are bound so to regard it. If they refuse to do so, the court should set aside their verdict.

ERROR to the circuit court for the southern district of New York. The pleadings and the facts in this case, with the addition of those particularly noticed in the opinion of the court, were the same with those in the preceding case of *Crane v. Jackson*.

*Beardsley and Hoffman*, for the plaintiff in error.

*Ogden and Wirt*, for the defendant.

[ \*628 ] \* STORY, J., delivered the opinion of the court.

Many of the questions arising in this case, have been disposed of in the judgment already pronounced in the case of *Crane v. Jackson*, upon the demise of the same parties; the title and evidence being in each case substantially the same. It will be necessary, therefore, to examine into those objections only, to the ruling of the circuit court at the trial, which are presented by the bill of exceptions taken by the defendant, (now plaintiff in error,) and which have not been decided in the other case.

The first objection is to the refusal of the court to instruct the jury

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that "Roger Morris was a grantor, or stood in the character of a grantor in that (the settlement) deed." This is but a slight variation in form from the point presented in the case of *Crane v. Jackson*; and the instruction given by the court, "that the mere possession of the deed by Morris, was no affirmative proof on either side of the fact of delivery," has been already fully considered.

The next objection is to the refusal of the court to instruct the jury that "the holding from the marriage settlement to the attainer cannot be said to have been under the settlement deed, until it was first ascertained that the deed had been delivered." This instruction was certainly proper in itself to have been given, if it had not been already substantially given in the other instructions; and if the court had given this reason for the refusal, there would not have been the slightest difficulty in maintaining it; for no court is bound at the mere instance of the party, to repeat over to the jury the same substantial proposition of law, in every variety of form, which the ingenuity of counsel may suggest. It is sufficient, if it is once laid down in an intelligible and unexceptionable manner. The instruction here asked and refused, was but a branch of the next preceding instruction prayed for, (which covered the whole ground,) and is so put by the defendant. The latter asserted, that "the fact that Morris and wife were in possession of the land before the Revolution, taking the rents and profits, is not of itself any evidence for or against the validity \* of the deed, because they were entitled to the [ \* 629 ] possession whether the deed was delivered or not." This instruction was given by the court, and the jury had been previously instructed that it was necessary to the validity of the deed that it should have passed into the hands of the trustees, or of some person for them, with the intent that it should take effect as a conveyance. Indeed, the whole controversy between the parties turned upon the question of the delivery of the settlement deed, as the tenor of every instruction asked, abundantly shows; and, therefore, it was necessarily implied in every step that there could be no holding or possession under the deed, if it was never delivered. It appears to us, then, that no injustice has been done to the defendant by refusing to give the instruction prayed; since, in a more general form, it had been already given.

The next objection is, to the refusal of the court to instruct the jury, first, that "in the absence of any direct evidence, that the trustees, or any other person for them, ever had the settlement deed, and the possession being equivocal in its character, the fact that it came out of the hands of Morris, in 1787, is sufficient of itself to rebut any presumption of a delivery arising from the proof of the deed by

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William Livingston, or the proof of the handwriting and death of the subscribing witnesses;" and, secondly, that if not sufficient of itself to destroy any presumption of a delivery, it is, at least, evidence against a delivery, to be considered and weighed by the jury." The court gave as a reason for refusing this second branch, that Morris was, "technically, neither grantor nor grantee, and therefore, the mere possession of the deed by Morris, was no affirmative evidence either for or against the fact of delivery." This instruction has been already disposed of. The other instruction varies from that in the case of *Crane v. Jackson*, merely in substituting the words "direct evidence" for "all proof;" and the words, "and the possession being equivocal in its character," for "and there being no proof of a holding under it." It is obnoxious to the same objection which was relied upon in that case, for it called upon the court to express an opinion upon the nature, weight, and effect of the evidence before the jury, which was no part of its duty. And the whole [ \* 630 ] evidence being before the jury, it was their exclusive right to decide for themselves upon its credit and cogency.

The next objection is to the admission of an extract from the journal of the assembly of the State of New York, for the year 1787, as follows: February 24, 1787. "Mr. Hamilton, from the committee to whom was referred the petition of Johanna Morris, on behalf of herself and the other children of Roger Morris and Mary his wife, setting forth that the said Roger and Mary had been attainted, and their estates sold and conveyed in fee-simple; that, by a settlement made previous to their intermarriage, the real estate of the said Mary was vested in Johanna Philipse and Beverley Robinson in the fee to certain uses; among others, after the decease of the said Roger and Mary, to the use of such child or children as they should have between them, and their heirs and assigns, and praying a law to restore to them the remainder of the said estate in fee, reported, that if the facts stated in such petition are true, the ordinary course of law is competent to the relief of the petitioners, and that it is unnecessary for the legislature to interfere. Resolved that the house do concur with the committee in the said report."

It was objected, first, that the journal of the proceedings in question, was not legal or competent evidence against the defendant; and, secondly not so without producing the petition mentioned in the journal. But the objections were overruled, and the evidence admitted.

Now, if the evidence was admissible for any purpose, the objections were rightly overruled. It did not appear to have been offered as proof of any of the facts stated in the petition, but simply of the

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public legislative proceedings, on the very claim and title now set up by the children of Morris at the early period of 1787. There were two points of view in which the evidence might be important, in the actual posture of the case before the jury. In the first place, it might be important to repel the notion that the claim of the children of Morris asserted in the present suit was stale, and founded upon a dormant deed, never brought forward until a very great lapse of time after its pretended execution, a circumstance which might essentially bear upon the fact of its having ever been delivered and acted upon as a valid instrument. In the \* next place, it [ \* 631 ] might add strength to the probate of the deed by Governor Livingston, as his attention could scarcely fail of being called to such public proceedings, occurring at so short a period as within two months before the time of that probate. If his attention was called to these proceedings, the circumstance that the title was about to become a *lis mota*, would naturally produce an increased caution, and a more anxious desire to recall, with perfect accuracy, every fact essential to the probate of the deed. It has been asserted at the bar, that these were the very objects for which the extract from the journal was offered ; and we cannot say that, for such purposes, it was not properly admissible. If any improper use, as evidence, was attempted to be made of it, it might have easily been restrained to its appropriate use by an application to the court. The objections, then, to its admission being general, and it being already admissible for some purposes, the decision of the court was unexceptionable.

The next objection is, that the court erred in refusing to instruct the jury that "the evidence upon the one side or the other should not be submitted to the jury as *prima facie* or presumptive evidence, either for or against a delivery; but the jury should consider and weigh the whole evidence together, and from the whole, determine whether or not the deed was delivered;" and in instructing the jury upon that prayer, "that the plaintiff had given *prima facie* evidence in support of his case, and such as was conclusive, if uncontradicted; and that this must be contradicted or disproved by controlling evidence on the part of the defendant, or the plaintiff is entitled to recover." The instruction prayed for and refused is precisely the same as exists in the case of *Crane v. Jackson*, and it is unnecessary to do more than to refer to the opinion there given for the reasons why this court deem the refusal entirely correct. In regard to the instruction actually given, we do not perceive any solid ground upon which it can be adjudged erroneous. It was given as a response to the instruction asked by the defendant on the great hinge of the controversy, the question as to the delivery of the settlement deed. In

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a preceding instruction which the court had given to the jury, upon the application of the defendant himself, the probate of the [ \* 632 ] deed by Governor Livingston before Judge Hobart, \* was treated as *prima facie* evidence of a delivery. It was there stated that the probate was "only *prima facie* evidence, or evidence from which a delivery may be presumed, and may be rebutted by direct or circumstantial evidence, which raises a contrary presumption." Is it not plain, then, that, if not so rebutted, the plaintiff is entitled to recover? What is *prima facie* evidence of a fact? It is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose. The jury are bound to consider it in that light, unless they are invested with authority to disregard the rules of evidence, by which the liberty and estate of every citizen are guarded and supported. No judge would hesitate to set aside their verdict and grant a new trial, if, under such circumstances, without any rebutting evidence, they disregard it. It would be error on their part, which would require the remedial interposition of the court. In a legal sense, then, such *prima facie* evidence, in the absence of all controlling evidence, or discrediting circumstances, becomes conclusive of the fact; that is, it should operate upon the minds of the jury as decisive to found their verdict as to the fact. Such we understand to be the clear principles of law on this subject. The very point in this very aspect occurred in the case of Carver v. Jackson, 4 Pet. 1, where the court, speaking of the probate of this very deed, used the following language (p. 82): "We are of opinion that, under these circumstances, and according to the laws of New York, there was sufficient *prima facie* evidence of the due execution of the indenture, by which we mean not merely the signing and sealing, but the delivery also, to justify the court in admitting it to be read to the jury; and that, in the absence of all controlling evidence, the jury would have been bound to find that it was duly executed. We understand such to be the uniform construction of the laws of New York in all cases where the execution of any deed has been so proved, and has been subsequently recorded. The oath of a subscribing witness before the proper magistrate, and the subsequent registration, are deemed sufficient *prima facie* evidence to establish its delivery as a deed. The objection was not, indeed, seriously pressed at the argument."

We have seen no reason, upon the present argument, to [ \* 633 ] be \* dissatisfied with the opinion thus expressed. It appears to us to be founded in principles of law, which cannot be shaken without undermining the great securities of titles to estates. The circuit court, in its instruction, did no more than express the same opinion, in language of the same substantial import.

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Upon the whole, upon a careful review of the case, we are of opinion that the judgment of the circuit court ought to be affirmed, with costs.

Mr. Justice BALDWIN dissented, in writing, but did not cause his opinion to be published.

14 P. 334.

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THE UNITED STATES, Plaintiff in Error, v. GEORGE M'DANIEL,  
Defendant in Error.

6 P. 634.

If more than the sum requisite for a writ of error is claimed in the *ad damnum*, and there is a general verdict for the defendant, the plaintiff may have a writ of error, though the bill of exceptions relates to items of less amount than such requisite sum.

ERROR to the circuit court of the United States for the county of Washington in the District of Columbia.

*Coxe*, for the defendant, moved to dismiss this suit for want of jurisdiction.

*Taney*, (attorney-general,) *contrd.*

MARSHALL, C. J., delivered the opinion of the court, overruling the motion. The declaration is for a balance of accounts of \$988.94, and the *ad damnum* is laid at \$2,000. The bill of exceptions shows that the United States claimed interest on the balance due to them. There is a general verdict for the defendant. Under these circumstances, it is no objection to the jurisdiction that the bill of exceptions was taken by the counsel for the United States to a refusal of the circuit court to grant an instruction asked by the United States, which was applicable to certain items of credit only, claimed by the defendant, which would reduce the debt below the sum of \$1,000. The court cannot judicially know what influence that refusal had upon the verdict.

The motion was overruled.

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HUGH BOYLE, Complainant and Appellant, v. JAMES W. ZACHARIE  
AND SAMUEL H. TURNER.

6 P. 635.

The ultimate opinion delivered by Mr. Justice Johnson, in the case of Ogden v. Saunders, 12 Wheat. 258, was concurred in and adopted by the three judges who were in the minority on the general question, and has settled the law involved therein.

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A contract of suretyship, entered into by consignees at New Orleans, to procure the release of a vessel consigned to them and attached for a debt of the consignor, who resided at Baltimore, and the implied obligation of the consignor to indemnify them, are Louisiana contracts, and are not governed by the law of Maryland.

A clause in a judgment, "subject to the legal operation of the defendant's discharge under the insolvent laws of Maryland," does not operate as an admission by the plaintiffs of their validity, or give to them, by consent, any effect.

THE case is stated in the opinion of the court.

*Wirt*, for the appellant.

*Scott*, contra.

[ \* 641 ] \* STORY, J., delivered the opinion of the court.

This is an appeal from a decree in equity to the circuit court for the district of Maryland, dismissing the bill of the plaintiff, now appellant.

The material circumstances are as follows : Zacharie and Turner are, and at the time of the transactions hereafter to be stated were, resident merchants at New Orleans, and Boyle a resident merchant at Baltimore. In the year 1818, Boyle being the owner of the brig Fabius, sent her on a voyage to New Orleans, consigned to Zacharie and Turner, where she arrived and landed her cargo, and Zacharie

and Turner procured a freight for her to Liverpool. After

[ \* 642 ] the cargo was put \* on board, and the brig was ready to sail, she was attached by process of law, at the suit of Messrs. Vincent, Nolte, and Co., of New Orleans, as the property of Boyle, for a debt due by him to them. Zacharie and Turner, with one Richard Relff, with a view to benefit Boyle, and enable the brig to perform her voyage, became security for Boyle upon the attachment, and thus procured the release of the brig. Upon information of the facts, Boyle approved of their conduct, and promised to indemnify them for any loss they might sustain on that account.

Messrs. Vincent, Nolte, and Co. recovered judgment in their suit, and Zacharie and Turner were compelled to pay the debt and expenses, amounting to \$3,113.30 ; and afterwards, on the 23d of December, 1819, they instituted a suit against Boyle for the recovery of the same, in the circuit court of Maryland. On the 31st of the same month of December, 1819, Boyle made application for the benefit of the insolvent act of Maryland, of 1816, c. 228, and eventually received a discharge under the same. On the 1st of May, 1821, judgment by confession was rendered in the suit, in favor of Zacharie and Turner, for the sum of \$3,113.80, with interest from the 15th of November, 1819, and costs of suit ; and a memorandum was entered of record, by consent of the parties, as follows : " This judgment sub-

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ject to the legal operation of the defendant's discharge under the insolvent laws of Maryland." The judgment having remained unexecuted for more than a year, it was revived by a *scire facias*; and writs of *fieri facias* were issued, and renewed from time to time, until the 12th of December, 1827, when a *fieri facias* was delivered to the marshal, who levied it on the ship General Smith, belonging to Boyle, on the 31st of March, 1828, and returned it to the May term of the circuit court of the same year.

The bill of the plaintiff was filed on the 7th of April, 1828, and stated most of the preceding facts, and prayed for an injunction to the further proceedings to enforce the execution of the judgment, and for general relief. The grounds relied on by the plaintiff, for this purpose, were, first, that his property is exempted from the levy, by his discharge under the insolvent act; secondly, that he is entitled to credit for certain commissions \* accruing to him [ \* 643 ] for certain business done for Zacharie since the judgment, and agreed to be deducted therefrom; and, thirdly, for the amount of losses sustained by the plaintiff in consequence of Zacharie and Turner having caused certain attachments for the same debt to be issued in Louisiana against the property of the plaintiff, in the hands of certain debtors of the plaintiff in that State. An injunction issued on the bill on the 8th of the same April.

The answer of the defendants (now appellees) having come in, the cause was set down for a hearing on the bill and answer (by which the facts stated in the answer must be taken to be true); and it was decreed by the court that the injunction be dissolved, and the bill dismissed without costs. From that decree the present appeal has been taken to this court.

The first point presented for argument, and indeed that which was the principal ground of the appeal, is as to the effect of the discharge under the insolvent act. This question is of course at rest, so far as it is covered by the antecedent decisions made by this court. The ultimate opinion delivered by Mr. Justice Johnson, in the case of *Ogden v. Saunders*, 12 Wheat. 213, 358, was concurred in and adopted by the three judges, who were in the minority upon the general question of the constitutionality of state insolvent laws, so largely discussed in that case. It is proper to make this remark, in order to remove an erroneous impression of the bar, that it was his single opinion, and not of the three other judges, who concurred in the judgment. So far, then, as decisions upon the subject of state insolvent laws have been made by this court, they are to be deemed final and conclusive.

It has been suggested that the memorandum of agreement accoun-

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panying the judgment, that it should be "subject to the legal operation of the insolvent laws of Maryland," ought to be deemed an acquiescence on the part of Zacharie and Turner, in the validity of that discharge, or at least a waiver of any claim in repugnance to it. We do not think so. The sole effect of that agreement is to save to the party whatever rights he may claim from the legal operation of those laws. It neither admits their validity, nor waives any rights of Zacharie and Turner, if they are unconstitutional.

It has in the next place been argued, that the contract [ \*644 ] upon \*which the judgment is founded, is, in contemplation of law, a Maryland contract, and not a Louisiana contract; that Boyle undertook to pay the money in the place where he resided, and not in the place where Zacharie and Turner resided. Our opinion is that this argument cannot be maintained. We do not admit that the original undertaking of Zacharie and Turner, in giving security in behalf of Boyle, was an unauthorized act, and beyond the scope of their just authority, as consignees of The Fabius. It was an act obviously done for the benefit of Boyle, and indispensable to enable the vessel to perform her voyage; and naturally implied from the relation of the parties, as owner and consignees. It must have been intended by the owner, that the consignees were to be at liberty to do any act for his benefit, which was or might be required in order to dispatch the vessel on the voyage. And Boyle himself seems to have admitted this to be true; for in the answer of Zacharie and Turner, (which is evidence in the cause,) it is expressly stated that Boyle, "so far from disapproving of the acts of these defendants, as above stated, thanked them for their prompt and correct management of his business, and undertook and promised to indemnify them from any loss which they might sustain on his account." Now that could scarcely be deemed a prompt and correct management of the business of the principal, which was wholly beyond the scope of the authority delegated to the agents. In this view of the matter, the contract of indemnity would clearly refer for its execution to Louisiana; as much so as if Boyle had authorized Zacharie and Turner to advance money there on his account, for which he would repay them. Such a contract would be understood by all parties to be a contract made in the place where the advance was to be made; and the payment, unless otherwise stipulated, would also be understood to be made there. The case would, in this aspect, fall directly within the authority of *Lanusse v. Barker*, 3 Wheat. 101, 146; see also *Coolidge v. Poor*, 15 Mass. 427; *Consequa v. Fanning*, 3 Johns. Ch. 587.

But if the contract had been unauthorized, and beyond the agency,

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still, the subsequent ratification of the transaction by Boyle would have the same operation, according to the well known maxim, that subsequent ratification is equivalent to a \* prior [ \* 645 ] order; and, when made, it has relation back to the time of the original transaction, and gives it as full a sanction as if it had been done under an original authority. The ratification of this contract, by Boyle, was complete and perfect; and he treated it as a Louisiana contract of indemnity, for his benefit, by which he was bound, and which he ought to discharge in that State.

As to the credit for commissions, that is no longer relied on; for the defendant's answer asserts distinctly that the amount has been already credited.

As to the attachments, it is not very easy to ascertain the grounds upon which Boyle attempts in his bill to assert an equity. Assuming that a bill would lie to have an equitable offset for unliquidated damages, occasioned by the misconduct of the creditors in not prosecuting such attachments with due diligence, where the debt has been lost by the insolvency of the garnishee in the intermediate period, on which we desire to be understood as expressing no opinion; still, there must be sufficient facts alleged in the bill to justify a presumption of loss. Now, in the present bill, there is no allegation whatsoever of any insolvency of the garnissees. The allegation as to one attachment is, "whereby your orator has been deprived of the benefit of any part of the debt, now due by the said Nelson, the garnishee, being somewhere about the sum of \$1,500, besides interest thereon, from the said year, when the attachment aforesaid was laid, and which sum is as completely lost to your orator, as if it had been paid over to the said Zacharie and Turner; who, for aught your orator knows, may have actually recovered the whole of it in virtue of said attachment, and may have refused to give credit for the same." And as to the other attachment, the allegation is, "that they also attached property belonging to your orator, which was in the hands of Messrs. Breedlove and Bradford, the garnissees, for which your orator has never received any credit, although it has been thus far completely lost to him, amounting, as he verily believes, to the sum of, &c., &c." So that the whole gravamen is, that the attachments have hitherto prevented him from receiving the debts and interest due from the garnissees. Under such circumstances, where Boyle might at any time have relieved himself from the

\* effects of the attachment, by the payment of the debt due [ \* 646 ] to Zacharie and Turner; and where he has himself acquiesced in the delay, without in any manner attempting to speed the suits; and where no connivance or indulgence is pretended to have

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existed in concert with the garnishees; and where there is no allegation in the bill itself, of any undue delay in prosecuting the attachments by the creditor, it is difficult to perceive any foundation on which to rest a claim for equitable relief. But the answer of the defendants shows still more forcible objections against the bill. This answer explicitly avers, that in both the attachments the garnishees denied having any funds of Boyle in their possession; Nelson, generally, and Breedlove, Bradford, and Co. with the qualification, any funds liable to the attachment; and the suits were dismissed accordingly. Copies of the proceedings are annexed to the answer, which demonstrate, if it had been necessary, the result of the averment; but it must be taken to be true, as the hearing was upon bill and answer.

It is added in the answer that the suit against Breedlove, Bradford, and Co., was commenced upon the information and at the request of Boyle; so that it was not *in invitum*, but was an arrest of his funds, upon his own suggestion, and with his own consent. Surely, a suit in chancery cannot be maintained in a case so naked of all real equity. But it is said that the answer of the garnishees, Breedlove, Bradford, and Co. admits that they are indebted to the plaintiff. But we must take that answer according to its terms and import; and, if so, then the admission is qualified. It is as follows: "we do not consider ourselves in debt to Hugh Boyle, or to Hugh Boyle and Co.; we received of Hugh Boyle and Co. some property, which has been sold, and the proceeds, say \$1,200 or \$1,300, placed to their credit on our books; but one of the house holds a claim against Hugh Boyle and Co. for upwards of \$2,500, which amount he refused to admit as a credit to our partner, but was willing to close Hugh Boyle and Co.'s account, by charging him and crediting the partner with the balance due said Boyle, and in this way said balance was held to pay the claim." They add, in an answer to another interrogatory, "we have no property of the defendants in this case,

[ \* 647 ] nor do \* we know of any." Now, it has not been shown at the argument, that in a process of this sort, under the local laws of Louisiana, the debt due to one partner might not be a good defence for the garnishees; and certainly the court cannot presume it. And, upon general principles, there can be little doubt, that in a court of equity, in a suit by Boyle seeking relief, such a counter claim would or might, under circumstances, furnish a good defence, if not to the firm, at least to the creditor partner, to rebut the claim of Boyle against him. Where there is an express denial by the garnishees, setting up an equity of any property in their hands liable to the attachment, that allegation ought to be presumed to be supported by the local law applicable to the facts, until the contrary

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is explicitly established. But the decisive answer is, that as this suit was commenced at the request of Boyle, and as the garnishees did not admit that they had property liable to the attachment, the onus is on Boyle, to show, that, nevertheless, by the local law the attachment might have been enforced. He has failed to establish any such proposition.

Upon the whole, it is the opinion of the court that the decree of the circuit court ought to be affirmed, with costs.

6 P. 648; 9 P. 329; 12 P. 300; 14 P. 1, 599, 614; 16 P. 303; 5 H. 295; 9 H. 530; 12 H. 139; 18 H. 268; 19 H. 890; 20 H. 555; 21 H. 582; 2 B. 499; 1 Wal. 228; 8 Wal. 688; 6 Wal. 166.

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**HUGH BOYLE, Plaintiff in Error, v. JAMES W. ZACHARIE AND SAMUEL H. TURNER.**

6 P. 648.

In modern times, courts of law exercise a summary jurisdiction, upon motion, over executions, and quash them, without putting a party to his writ of *audita querela*; but these motions are addressed to the sound discretion of the court, and their refusal is not a ground for a writ of error.

The chancery jurisdiction of the courts of the United States is the same in all the States, and the rule of decision is the same in all. Its remedies are not regulated by the state practice.

Though the forms and modes of proceeding under writs of execution in the State have been adopted by congress, they are not controlled by collateral restrictions which the State has imposed on its courts, and, though an injunction, by a state law, may operate as a *supersedeas*, this does not govern executions from the courts of the United States.

At common law, a *supersedeas* must come before a levy, otherwise the sheriff may sell on a *venditioni*.

THE case is stated in the opinion of the court.

*Wirt*, for the plaintiff.

*Scott*, contrà.

\* STORY, J., delivered the opinion of the court.

[ \* 654 ]

This is a writ of error to the circuit court of the district of Maryland, between the same parties, and upon the same judgment on which the bill in equity, which has just been disposed of, was founded. The facts relative to the judgments need not be again repeated, as they are fully disclosed in the preceding cause.

The object of the present writ of error is to revise the decision of the circuit court in refusing to quash a writ of *venditioni exponas*, issued for the sale of the ship General Smith, which was seized upon the *fieri facias* on the judgment, upon a motion made by the counsel for Boyle for that purpose. \*The *fieri facias* [ \* 655 ] was levied on the ship on the 31st of March, 1828; the bill in equity was filed, and an injunction awarded, on the 8th of the

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succeeding April. On the 8th of May following, the writ of *fieri facias* was returned to the circuit court with the marshal's return thereon, "levied as per schedule on the 31st of March, 1828. Injunction issued on the 8th of April, 1828." On the 29th of August, 1829, a writ of *venditioni exponas* issued from the circuit court, returnable to the next December term of the court. At the return term, a motion was made in behalf of Boyle, to quash the *venditioni exponas*, grounded, among other things, upon the injunction, and bond given in pursuance thereof, and the provisions of the act of Maryland of 1799, c. 79, and the act of Maryland of 1723, c. 8. A rule was then made, at the same term, upon the marshal, to return the writ of *venditioni exponas*, upon which he made a return, in substance, that the amount of the money had been paid into his hands, and was now in bank to his credit, to be returned as made under the writ of *venditioni exponas*, if the court should be of opinion that it rightfully issued; and empowered and obliged the marshal to sell the ship seized under the *fieri facias* issued in 1828, stayed by injunction as aforesaid. The court overruled the motion to quash the *venditioni exponas*, and ordered the money returned on the writ to be brought into court. The present writ of error is brought upon this refusal to quash the *venditioni exponas*.

The first question naturally presenting itself upon this posture of the facts is, whether a writ of error lies in such a case. It is material to state that no error is assigned on the original judgment, or on the award of the *fieri facias*, which, indeed, are conceded to have been rightfully issued, and to be above exception. But the error assigned is the supposed irregularity and incorrectness of the award of the *venditioni exponas*, after the writ of injunction from the chancery side of the court had been granted.

The argument to maintain the writ of error has proceeded, in a great measure, upon grounds which are not in the slightest degree controverted by this court. It is admitted that the language in Co.

Litt. 288, b., is entirely correct, in stating that "a writ of [ \* 656 ] error lieth when a man is grieved by an error in \* the foundation, proceeding, judgment, or execution" in a suit. But it is added, in the same authority, that, "without a judgment, or an award in the nature of a judgment, no writ of error doth lie." If, therefore, there is an erroneous award of execution, not warranted by the judgment, or erroneous proceedings under the execution, a writ of error will lie to redress the grievance. The question here is not, whether a writ of error lies to an erroneous award of execution, for there was no error in the award of the *fieri facias*. But the question is, whether a writ of error lies on the refusal to quash the auxiliary

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process of *venditioni exponas*, upon mere motion. In modern times, courts of law will often interfere by summary proceedings on motion, and quash an execution erroneously awarded, where a writ of error or other remedy, such as a writ of *audita querela*, would clearly lie. But, because a court may, it does not follow that it is bound thus to act in a summary manner; for in such cases the motion is not granted *ex debito justitiae*, but in the exercise of a sound discretion by the court. The relief is allowed or refused, according to circumstances; and it is by no means uncommon for the court to refuse to interfere upon motion, in cases where the proceedings are clearly erroneous, and to put the party to his writ of error or other remedy; for the refusal of the motion leaves every remedy, which is of right, open to him.

In *Brooks v. Hunt*, 17 Johns. 484, Mr. Chancellor Kent, in delivering the opinion of the court of errors, alluding to this practice, said: "It is not an uncommon thing for a court of law, if the case be difficult or dubious, to refuse to relieve a party after judgment and execution in a summary way by motion, and to put him to his *audita querela*." That was a case very similar to the present. A motion was made to the supreme court of New York to set aside a *fieri facias*, on the ground that the party was discharged under the insolvent laws of that State. The court refused the motion; and, on error brought, the court of errors of New York quashed the writ of error. Mr. Chancellor Kent, on behalf of the court, assigned as one of the grounds of quashing the writ of error, that the rule or order denying the motion was not a judgment within the meaning of the constitution or laws of New York. It was only a decision upon a collateral or interlocutory point, \* and could not well [ \* 657 ] be distinguished from a variety of other special motions and orders, which are made in the progress of a suit, and which have never been deemed the foundation of a writ of error. A writ of error would only lie upon a final judgment or determination of a cause; and it was never known to lie upon a motion to set aside process. And in the close of his opinion, he emphatically observed, if the case "is to be carried from this court to the supreme court of the United States, I should hope, for the credit of our practice, it might be on the *audita querela*, and not upon such a strange mode of proceeding as that of a writ of error brought upon a motion and affidavit." There are other cases leading to the same conclusion. See *Wardell v. Eden*, 1 Johns. 531, note; *Wicket v. Creamer*, 1 Salk. 264; *Johnson v. Harvey*, 4 Mass. 483; *Bleasdale v. Darby*, 9 Price, 606; *Clason v. Shotwell*, 1 Tidd's Prac. 470, 471; Kent's (Chancellor) Opinion, 12 Johns. 31, 50; Com. Dig. Pleader, 3 B. 12.

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A very strong case illustrating the general doctrine is, that error will not lie to the refusal of a court to grant a peremptory *mandamus*, upon a return made to a prior *mandamus*, which the court allowed as sufficient. This was held by the house of lords, in *Pender v. Herle*, 3 Bro. Parl. Cases, 505.

We consider all motions of this sort to quash executions, as addressed to the sound discretion of the court; and as a summary relief, which the court is not compellable to allow. The party is deprived of no right by the refusal; and he is at full liberty to redress his grievance by writ of error, or *audita querela*, or other remedy known to the common law. The refusal to quash is not, in the sense of the common law, a judgment; much less is it a final judgment. It is a mere interlocutory order. Even at the common law, error only lies from a final judgment; and, by the express provisions of the Judiciary Act of 1789, c. 20, § 22,<sup>1</sup> a writ of error lies to this court only in cases of final judgments.

But if this objection were not, as we think it is, insuperable, there would be other decisive objections against the party. In the first place, the very ground of argument to maintain the motion to quash is, that the injunction operated as a *supersedeas* of the execution, according to the acts of Maryland of 1723, c. 8, and of 1799, [ \* 658 ] c. 79, regulating proceedings \*in chancery and injunctions, which give to an injunction the effect of a *supersedeas* at law. But the acts of Maryland regulating the proceedings on injunctions, and other chancery proceedings, and giving certain effects to them in courts of law, are of no force in relation to the courts of the United States.

The chancery jurisdiction given by the constitution and laws of the United States, is the same in all the States of the Union, and the rule of decision is the same in all. In the exercise of that jurisdiction, the courts of the United States are not governed by the state practice; but the act of congress of 1792, c. 36,<sup>2</sup> has provided that the modes of proceeding in equity suits shall be according to the principles, rules, and usages which belong to courts of equity, as contradistinguished from courts of law. And the settled doctrine of this court is, that the remedies in equity are to be administered, not according to the state practice, but according to the practice of courts of equity in the parent country, as contradistinguished from that of courts of law; subject, of course, to the provisions of the acts of congress, and to such alterations and rules as, in the exercise of the powers delegated by those acts, the courts of the United States may,

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<sup>1</sup> 1 Stats. at Large, 84.

<sup>2</sup> Ib. 275.

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from time to time, prescribe. *Robinson v. Campbell*, 3 Wheat. 212; *United States v. Howland*, 4 Wheat. 108. So that, in this view of the matter, the effect of the injunction granted by the circuit court was to be decided by the general principles of courts of equity, and not by any peculiar statute enactments of the State of Maryland.

Strictly speaking, at the common law an injunction in equity does not operate as a *supersedeas*; although it may furnish a proper ground for the court of law in which the judgment is rendered, to interfere by summary order to quash or stay the proceedings on the execution. If the injunction is disobeyed, a court of equity has its own mode of administering suitable redress. But a court of law is under no obligations to enforce it as a matter of right or duty. In respect to suits at common law, it is true that the laws of the United States have adopted the forms of writs, executions, and other process, and the modes of proceeding authorized and used under the state laws, subject, however, to such alterations and additions as may from time to time be made by the courts of the United States. But writs and executions, \* issuing from the courts [ \* 659 ] of the United States in virtue of these provisions, are not controlled or controllable in their general operation and effect by any collateral regulations and restrictions which the state laws have imposed upon the state courts to govern them in the actual use, suspension, or superseding of them. Such regulations and restrictions are exclusively addressed to the state tribunals, and have no efficacy in the courts of the United States unless adopted by them. The case of *Palmer v. Allen*, 7 Cranch, 550, 564, furnishes a commentary on this point; and it is freely expounded and illustrated in the subsequent cases of *Wayman v. Southard*, 10 Wheat. 1, and *United States Bank v. Halstead*, 10 Wheat. 51. No rule of the circuit court of Maryland has been produced which adopts these state regulations; and the existence of one is not to be assumed.

But if the injunction could be admitted to operate as a *supersedeas* at law, under any circumstances, in the courts of the United States, there would yet remain a decisive objection against its application in the present case. Nothing is better settled at the common law than the doctrine that a *supersedeas*, in order to stay proceedings on an execution, must come before there is a levy made under the execution; for if it comes afterwards, the sheriff is at liberty to proceed upon a writ of *venditioni exponas* to sell the goods. There are many cases in the books to this effect; but they are admirably summed up by Lord Chief Justice Willes, in delivering the opinion of the court in *Meriton v. Stevens*, Willes, 271, 280; to which alone, therefore, it seems necessary to refer. See *Charter v. Pector*, Cro. Eliz. 597;

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Moore, 542; Clerk *v.* Withers, 6 Mod. 290, 293, 298; s. c. 1 Salk. 321; Blanchard *v.* Myers, 9 Johns. 66; 2 Tidd's Pr. 1072; Com. Dig. Execution, C. 5, C. 8; Bac. Abridg. Supersedeas, G. See also McCullough *v.* Guetner, 1 Binn. 214.

In the present case, the levy on the *fieri facias* was made more than a week before the injunction was granted; so that, according to the course of the common law, it ought not to operate as a *supersedeas* to the *venditioni exponas*.

In every view of this case it is clear that there is no error in the proceedings, which is revisable by this court. Whatever might have been properly done by the circuit court, upon the motion to [ \* 660 ] \*quash, in order to give full effect to its own injunction, was matter exclusively for the consideration of that court in the exercise of its discretion, and is not reexaminalbe here. And there is no pretence of any error in the judgment or award of the execution under which the levy was made. The judgment of the circuit court is therefore affirmed, with damages at the rate of six per cent. and costs.

16 P. 308; 8 W. 648; 9 O. 401.

*Ex Parte JOHN A. DAVENPORT.*

6 P. 661.

Under the 65th section of the collection act of March 2, 1799, (1 Stats. at Large, 677,) though the party is interdicted from an imparlance, or any other means or contrivances for mere delay, he is not shut out from any defence upon the merits; he may plead a tender.

The allowance of double pleading is not a matter of absolute right, and a writ of *mandamus* will not be issued, to compel an inferior court to permit more than one plea to be filed.

Though a writ of *mandamus* was refused, the court expressed an opinion on the question of law which gave occasion for the application.

THE case is stated in the opinion of the court.

*Hall*, for the motion.

*Taney*, (attorney-general,) *contra*.

[ \* 663 ] \* STORY, J., delivered the opinion of the court.

This is a motion for a *mandamus* to the district judge for the southern district of New York, directing him to restore to the record a plea of tender, which had been filed, together with a plea of *non est factum*, by Davenport, in a suit on a custom-house bond for the payment of duties, brought against him in that court; and which had been ordered by the court to be struck from the docket as a nullity. As the allowance of double pleas and defences is a matter not of absolute right, but of discretion in the court, and as the courts

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constantly exercise a control over this privilege, and will disallow incompatible and sham pleas, no *mandamus* will lie to the court for the exercise of its authority in such cases; it being a matter of sound discretion, exclusively appertaining to its own practice. We cannot say judicially, that the court did not order the present plea to be struck from the record on this ground, as the record itself furnishes no positive means of information.

But it appears from the affidavit of the party, and the opinion of the district court, with a copy of which we have been furnished, that the plea was in fact struck from the record upon the ground that, under the 65th section of the duty collection act of 1799, c. 128, the defendant has not a right to make every defence which he would be entitled to make in a suit at common law upon such a bond; but that the statute contemplates a summary proceeding and judgment against him, without preserving to him the same right of a trial by jury upon litigated questions of fact, at least not upon such questions of fact as are not within the issue of *non est factum*.

\* The words of the 65th section of the act are: "And [ \* 664 ] where suit shall be instituted on any bond for the recovery of duties due to the United States, it shall be the duty of the court where the same may be pending to grant judgment at the return term, upon motion; unless the defendant shall in open court, &c., make oath or affirmation that an error hath been committed in the liquidation of the duties demanded upon such bond, specifying the errors, &c., &c.; whereupon, if the court be satisfied that a continuance until the next succeeding term is necessary for the attainment of justice, and not otherwise, a continuance may be granted until the next succeeding term, and no longer." In our opinion, upon the true interpretation of this provision, the legislature intended no more than to interdict the party from an imparlance, or any other means or contrivances for mere delay. He should not by sham pleadings, or by other pretended defences, be allowed to avail himself of a postponement of judgment to the injury of the government, and in fraud of his obligation to make a punctual payment of the duties when they had become due.

But we perceive no reason to suppose that the legislature meant to bar the party from any good defence against the suit, founded upon real and substantial merits. And certainly we ought not, in common justice, to presume such an intention without the most express declarations. To deprive a citizen of a right of trial by jury, in any case, is a sufficiently harsh exercise of prerogative, not to be raised by implication from any general language in a statute. But to presume that the government meant to shut out the party from all

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defences against its claims, however well founded in law and justice, without a hearing, would be pressing the doctrine to a still more oppressive extent. We think the language of the 65th section neither requires nor justifies any such interpretation. It merely requires that judgment should be rendered at the return term, unless delay shall be indispensable for the attainment of justice, and there is no impossibility or impracticability in the court's making such rules in relation to the filing of the pleadings, and the joining of issues in this peculiar class of cases, as will enable the causes to be heard and tried upon the merits, and a verdict found at the return term of the court. It is a matter of common practice in all classes [ \* 665 ] of cases \* at least in one of the circuits, and no inconvenience or hardship has hitherto grown out of it; special exceptions, founded upon extraordinary circumstances, are and may be disposed of upon special application for delay.

We have thought it right to express this opinion on the present occasion, because it appears that there has been a diversity of judgment among the district judges upon the subject. It is probable that the district judge of the southern district of New York, will, upon this intimation, grant the proper relief. If he should not, we cannot interfere by way of *mandamus*; unless the objection is put upon the record in a proper form, which it does not appear to be in the present case.

*Motion overruled.*

15 W. 870.

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STEPHEN LINDSEY and others, Plaintiffs in Error, *v.* THE LESSEE or THOMAS B. MILLER, Defendant in Error.

6 P. 666.

The act of March 2, 1807, (2 Stats. at Large, 424,) was intended to cure defects in entries and surveys, which had occurred without fraud, in the pursuit of a valid title, but not to give validity to a title under a Virginia land warrant, not within the reservation made by that State in the act of cession of lands northwest of the Ohio.

So long as the government held the title to the land demanded, there could be no adverse possession, to cause the statute of limitations to run.

THE case is stated in the opinion of the court.

*Ewing and Corwin*, for the plaintiffs.

*Leonard and Doddridge*, contrà.

[ \* 672 ] M'LEAN, J., delivered the opinion of the court.

This is a writ of error brought to reverse a judgment of the circuit court, for the district of Ohio. The plaintiff in the court below prosecuted an action of ejectment to recover possession of

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450 and a half acres of land, lying in what is called the Virginia military district, and known by entry numbered 12,495.

Stephen Lindsey and others were made defendants, and were proved to be in possession of the land in controversy.

On the trial, the plaintiff exhibited a patent for the land, bearing date the 1st December, 1824, which was founded on an entry and survey executed in the same year.

The defendants offered in evidence a patent issued by the commonwealth of Virginia, in March, 1789, to Richard C. Anderson, for the same land, which was rejected by the court. They then gave in evidence an entry and survey of the land, made in January, 1783, which were duly recorded on the 7th of April in the same year, and proved possession for upwards of thirty years.

The plaintiff then offered in evidence the warrant on which the entry and survey of the defendants were made; accompanied by proof that the military services for which said warrant issued, were performed in the Virginia state line, and not on the continental establishment. This fact was apparent on the face of the warrant. To the admission of this evidence the defendants objected.

The defendants then requested the court to instruct the jury that the uninterrupted possession for more than twenty-one years, was a bar to the plaintiff's recovery. That this possession under the entry and survey before stated, ought to protect them against the title of the plaintiff. The court refused to give the instructions; on which ground, and because the court admitted the evidence offered by the plaintiff, which \* was objected to by the defendants, [ \*673 ] a bill of exceptions was taken, which presents to this court the above questions.

That the possession of the defendants does not bar the plaintiff's action, is a point too clear to admit of much controversy. It is a well settled principle, that the statute of limitations does not run against a State. If a contrary rule was sanctioned, it would only be necessary for intruders upon the public lands, to maintain their possessions, until the statute of limitations shall run; and then they would become invested with the title against the government, and all persons claiming under it. In this way, the public domain would soon be appropriated by adventurers. Indeed, it would be utterly impracticable, by the use of any power within the reach of the government, to prevent this result. It is only necessary, therefore, to state the case, in order to show the wisdom and propriety of the rule that the statute never operates against the government.

The title under which the plaintiff in the ejection claimed, emanated from the government in 1824. Until this time there was no

title adverse to the claim of the defendants. There can, therefore, be no bar to the plaintiff's action.

To understand the objection to the validity of the defendant's title, under their entry, survey, and patent, it will be necessary to advert to the conditions on which the district of country, within which the location was made, was ceded by Virginia to the United States.

By her deed of cession, which was executed in behalf of the commonwealth by her delegates in congress in 1784, Virginia conveyed to the United States the territory northwest of the River Ohio, with certain reservations and conditions, among which was the following: "that in case the quantity of good land on the southeast side of the Ohio, upon the waters of the Cumberland River, and between the Green River and Tennessee River, which have been reserved, by law, for the Virginia troops on continental establishment, should, from the North Carolina line bearing in further upon the Cumberland lands than was expected, prove insufficient for their legal bounties; the deficiency should be made up to the said troops in good lands, to be laid off between the rivers Sciota and Little

Miami, on the northwest side of the River Ohio; in such [\*674] \*proportions as have been engaged to them by the laws of Virginia."

From this condition, it is clear that, until the good land was exhausted in the district of country named, the holders of Virginia warrants had no right to locate them in the above reservation. This is the construction given by congress to the deed of cession, as appears from a resolution adopted by them on the subject. It was also deemed necessary that Virginia should give notice to the general government when the Green River lands were exhausted, which would give a right to the holders of warrants to locate them in the district north of the Ohio.

Lands could be entered in this district only by virtue of warrants issued by Virginia, to persons who had served three years in the Virginia line, on the continental establishment.

In May, 1800, by an act of congress,<sup>1</sup> the proper officer was authorized to "issue patents on surveys which have been, or may be made within the territory reserved by the State of Virginia, northwest of the River Ohio, and being part of her cession to congress, on warrants for military services issued in pursuance of any resolution of the legislature of that State, previous to the passing of that act, in favor of persons who had served in the Virginia line on the continental establishment."

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Several laws were subsequently passed in relation to this reservation, and to the rights of warrant holders; in all of which a reference is made to warrants issued for services performed on the continental establishment. This was in conformity to the deed of cession; and, although not necessary, was deemed proper, in giving time, to locate warrants in this district, in order to prevent the semblance of right from being acquired by virtue of locations made on other warrants.

It was known that Virginia had issued other military warrants for services in her state line, which gave no right to the holder to make an entry in the above district.

In the act of the 2d of March, 1807, to extend the time for locating military warrants in the reserved district, and for other purposes, it is provided, "that no locations within the above-mentioned tract, shall, after the passing of that act, be made on tracts of land for which patents had been previously \*issued, or which had [ \*675 ] been previously surveyed; and any patent obtained contrary to the provisions of that act, was declared to be null and void."

As by the deed of cession the fee to this district passed to the United States, the patents for lands entered and surveyed within it, necessarily emanated from the general government. It is therefore clear that the circuit court did not err in rejecting, as evidence, the patent which was issued by Virginia for this land several years subsequent to the deed of cession. But the defendants below rely upon their survey, as being protected by the act of 1807. This is the main point in the case, and it becomes necessary fully to consider it.

The entry and survey of the defendants were made before the deed of cession, but it is not contended that, at the time this location was made, the land within this district, under the laws of Virginia, was liable to be appropriated in satisfaction of warrants granted by the State for military services in the state line. The fact, therefore, of this location having been made, while the fee of this district remained in Virginia, cannot give it validity, as the entry was not made in pursuance of the laws of Virginia.

By the act of 1807, any patent is declared to be void that shall be issued on an entry of land which had been previously patented or surveyed. This language is general, and literally applies to all surveys which had been previously made, whether made with or without authority. Could congress have designed by this act to protect surveys which had been made without the semblance of authority? If an intruder, without a warrant, had marked boundaries in a survey, either large or small, would it be protected under the act? When the object and scope of the act are considered, and other laws which have been enacted on the same subject, and the deed of

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cession are referred to, it would seem that much difficulty cannot be felt in giving a correct construction to this provision.

In making the cession, Virginia only reserved the right of satisfying warrants issued for military services in the state line, on the continental establishment. Warrants of no other description, therefore, could give any right to the holder, to any land in this district.

In all the acts subsequently passed, giving further time for [ \* 676 ] the location of warrants in this reservation, \* there is a reference to the kind of warrants which may be located. And in the act of 1807, the "officers and soldiers of the Virginia line on continental establishment, are named as entitled to land in the district."

No act of congress passed subsequent to the deed of cession, which enlarged the rights of Virginia to this district, beyond the terms of the cession. Longer time has repeatedly been given for locations, but no new rights have been created. It would seem, therefore, to follow, that when the act of 1807 was passed, for the protection of surveys, congress could have designed to protect such surveys only as had been made in good faith. They could not have intended to sanction surveys made without the shadow of authority, or, which is the same thing, under a void authority.

It is known to all who are conversant with land titles in this district, that the mode pursued in making entries and surveys under the Virginia land law, gave rise to the most ruinous litigations. The docket of this court contains abundant evidence of this fact. By the law of 1807, congress intended to lessen litigation.

It is essential to the validity of an entry, that it shall call for an object notorious at the time, and that the other calls shall have precision. A survey, unless carried into grant, cannot aid a defective entry against one made subsequently. The survey, to be good, must be made in pursuance to the entry.

To cure defects in entries and surveys was the design of the act of 1807. It was intended to sanction irregularities, which had occurred without fraud, in the pursuit of a valid title. In the passage of this act, congress could have had no reference, but to such titles as were embraced by the deed of cession.

The case of Miller and others *v.* Kerr and others, reported in 7 Wheat. 1, is cited by the defendants' counsel. In this case, the register of the land-office of Virginia, had by mistake, given a warrant for military services in the continental line, on a certificate authorizing a warrant for services in the state line. An equity acquired under this warrant was set up against a legal title subsequently obtained; but the court sustained the legal title. They considered

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the register a ministerial officer, and that his official acts, as such, might be inquired \* into. This entry was made subsequent to the deed of cession ; and the court seemed to think if this territory had not been ceded, there would have been great force in the argument, that, as the holder was entitled to the land for services rendered, and as, by the mistake of the officer, he had been prevented from locating the warrant in Kentucky, and as no provision existed by which his claim could be satisfied, if the entry made should not be sustained, that under such circumstances it should be held valid. The case was a hard one, but the court were clear that, by virtue of the warrant thus issued, no right could be acquired in the Virginia reservation.

The case of Hoofnagle and others *v.* Anderson, 7 Wheat. 212, is strongly relied on as a case, if not directly in point, that has at least a strong bearing on the question under consideration. In that case, the court decided that a patent is a title from its date, and conclusive against all those whose rights did not commence previous to its emanation. The entry on which this patent was founded was made in the Virginia reservation, by virtue of a warrant which was in fact issued for services in the state line ; but it was stated on its face to have been issued for services on the continental establishment.

This case would have been similar to the one under consideration, if the patent had not been issued ; but the decision turned against the subsequent locator, on the ground that the patent appropriated the land.

The court say, that the "principle is well settled, that a patent is unassailable by any title commenced after its emanation." The case of Jackson *v.* Clark *et al.* 1 Pet. 628, it is contended, bears a close analogy to the one under examination. That was a case where the act of 1807 was decided to protect a survey, although made on a warrant which had been previously located and not withdrawn. But the court sustained the survey, on the ground that it was not a void act, though it might be irregular. That, to the purchaser of the survey, there was no notice of irregularity, much less of fraud.

The warrant was valid, and upon its face authorized the entry. The entry had been regularly made on the books of the surveyor, and the survey had been executed by a regular officer ; and the only objection to the validity of the proceedings was, that the warrant had been previously located. This \* location, the [ \* 678 ] court said, might be withdrawn, and that would remove all objections to the subsequent proceedings. And they intimate that the powers of a court of chancery were sufficient to have compelled the original locator to withdraw the first entry, or enjoin him from

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the use of it, so as to remove the objections to the second entry. Under all the circumstances of the case, they consider that the second survey was protected from subsequent entries by the act of 1807.

They say: "If it be conceded that this provision in the above act was not intended for the protection of surveys which were in themselves absolutely void, it must be admitted that it was intended to protect those which were defective, and which might be avoided for irregularity."

There can be no doubt that congress did intend to protect surveys which had been irregularly made, and it is equally clear that they did not design to sanction void surveys. A survey is void, unless made under the authority of a warrant; and it need not be stated again, that the warrant under which the survey of the defendants in the circuit court was made, gave no right to the holder to appropriate land north of the Ohio.

Neither the entry nor the survey is a legal appropriation of the land. The claimant is only vested with the equitable estate, until his entry and survey have been carried into grant.

This court decided, in the case of *Taylor's Lessee v. Myers*, 7 Wheat. 23, that the act of 1807, did not protect a survey from which the entry had been withdrawn.

In the argument, it was insisted that the entry and survey having been made in the name of Richard C. Anderson, the principal surveyor, were void under the laws of Virginia, that by those laws he was prohibited from making an entry in his own name.

As there are other points in the cause on which the decision may rest, it is unnecessary to investigate this one further than to observe that, under other circumstances, it might be entitled to serious consideration.

This is a case of great hardship on the part of the defendants below; and regret is felt that the principles of law which are involved in the cause do not authorize a reversal of the judgment given by the circuit court.

[ \* 679 ] \*The judgment must be affirmed, with costs, and the cause remanded for further proceedings.

BALDWIN, J., dissented, and gave an opinion in writing which was not published.

12 P. 264; 3 H. 82, 650; 13 W. 104; 14 W. 145; 8 U. 488.

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**CADWALLADER WALLACE, Plaintiff in Error, v. JOSIAH C. PARKER,  
Defendant in Error.**

6 P. 680.

The act of March 2, 1807, (2 Stats. at Large, 424,) to cure defects, &c., in entries and surveys, &c., extends to every case which comes within the reservation made by Virginia in her act of cession; and a warrant which in fact was issued in virtue of a resolution of the general assembly of that State, before the act of cession, for military services in the continental line, is within the act of cession, though it does not purport on its face to be issued by virtue of such resolution, and though the term of service was not as great as was required by the standing law of the State for such grants at the time the resolution was passed.

THE case is stated in the opinion of the court.

*Creighton*, for the plaintiff.

*Corwin*, contra.

\* MARSHALL, C. J., delivered the opinion of the court. [ \* 686 ]

This is a writ of error to a decree pronounced by the supreme court of the State of Ohio, sitting in and for the county of Brown, in a case in which the defendant in error was plaintiff. The case must, therefore, be brought within the 25th section of the Judicial Act,<sup>1</sup> or this court cannot take jurisdiction of it.

The plaintiff in error alleges that the construction of an act of congress was drawn in question on the trial, and that the decision was against the title set up under the act; and also, that the construction of a state law was drawn in question, as being contrary to an act of congress, and the decision was in favor of the party claiming under the state law.

Josiah Parker obtained a land-warrant from the land-office of Virginia, for his services in the Virginia line, on continental establishment. The defendant in error having located the [ \* 687 ] warrant on lands in the military reserve, and received a patent therefor, instituted a suit in chancery against the plaintiff in error, who held the same land under a prior grant, and obtained a decree for a conveyance. This court cannot examine the general merits of the decree. Our inquiries are in this case limited to the question, whether the record shows that an act of congress has been misconstrued, to the injury of the plaintiff in error, or the title of the defendant in error has been sustained by a law of a State which is repugnant to a law of the United States. Both questions depend on the construction of the act by which Virginia ceded the territory she claimed northwest of the River Ohio to the United States, of the resolution accepting the deed of cession, and of the acts of congress

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<sup>1</sup> 1 Stats. at Large, 85.

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prolonging the time for completing titles to lands within the Virginia military reservation.

The deed of cession was executed by the members of congress, then representing the State of Virginia, on the 1st of March, 1784; in virtue of a power conferred on them by the act of cession, which act it recites. One of the conditions on which the cession is made, is, 1 Laws U. S. p. 474, "that in case the quantity of good lands on the southeast side of the Ohio," "which have been reserved by law, for the Virginia troops or continental establishment, should" "prove insufficient for their legal bounties, the deficiency should be made up to the said troops, in good lands to be laid off between the rivers Sciota and Little Miami, on the northwest side of the River Ohio, in such proportions as have been engaged to them by the laws of Virginia."

The deed was accepted by congress according to its terms. The act of cession to which the deed refers was passed on the 20th of December, 1783.

In his answer to an amended bill filed by the plaintiff in the state court, the defendant says: "That if the complainant's entry does contain that certainty and precision which the law requires, in order to constitute a valid entry, yet the complainant has no equitable claim to the lands in question, because, first, said entry is based upon a resolution warrant, which is not protected by any act of congress; and cannot, therefore, be a foundation on which to base a valid entry."

[ \* 688 ] \* The warrant to which the answer refers is in the usual form, and does not purport to have been issued in virtue of a resolution. But the warrant did in fact issue on a resolution which appears in the proceedings in the cause.

It appears that Colonel Josiah Parker presented a petition to the general assembly of Virginia, in which he stated himself to have served two years and ten months in the Virginia line on continental establishment, after which he resigned his commission as a colonel in the army. That, since his resignation, he had been called into service as colonel, commanding a corps of militia, during every invasion of the State. He prays that the assembly will grant him a colonel's allowance of lands. This petition was referred to a committee, whose report stated the facts, and concluded with the following resolution: "Resolved, that the petition of the said Josiah Parker, praying that he may be allowed the bounty in lands, by law given to a colonel in the continental line, is reasonable." This resolution was approved by the senate, and was passed the 20th of November, 1783.

In March, 1807, congress passed an act, extending the time for

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locating Virginia military land-warrants, which enacts "that the officers and soldiers of the Virginia line on continental establishment, their heirs or assigns, entitled to bounty lands within the tract reserved by Virginia, between the little Miami and Sciota rivers, for satisfying the legal bounties to her officers and soldiers upon continental establishment, shall be allowed a further time," &c. This act was continued by subsequent acts, so as to be in force when the survey was made under which the complainant in the state court obtained his decree. Does the act cover his case?

We think it extends to every case which comes within the reservation made by Virginia in her act of cession. The deficiency of good lands on the southeast of the River Ohio, having been admitted by congress, the inquiry is, whether the warrant granted to Josiah Parker is among those for which the reserve on the northwestern side of that river was made?

The resolution grants the land to Josiah Parker as a colonel in the continental line. At the time it was passed, Virginia possessed the territory in which it was located in \*absolute [ \* 689 ] sovereignty. The deed of cession had not been executed, nor had the act been passed by which that deed was authorized. Congress, by accepting the cession, admitted the right to make it, and that right has never since been drawn into question.

The resolution then gave to Josiah Parker all the right it purported to give. What was that? "The bounty in lands by law given to a colonel in the continental line." By this resolution, Josiah Parker was placed by the State of Virginia on precisely the same footing with a colonel who claimed under the act which had previously been passed. Had the cession never been made, no distinction could have been taken between them. The officer by whom the warrant was issued, perceived no distinction, and the warrant is expressed to be "for his services for three years as a colonel in the Virginia continental line." To discover what services the legislature received as an equivalent for two months of this time, services performed at the head of corps of militia, we must look at the petition and the report of the committee.

But the legislature at that time possessed the same power to bestow their bounty on an officer who had performed the services stated in Colonel Parker's petition, and in the report of the committee, as on one who had completed his three years in the continental line. They possessed the same power to bestow that bounty on an individual in the form of a resolution, as on their officers, generally, in the form of an act. The one conferred the same rights as the other, and was equally obligatory on the State. Had the lands been retained by

Virginia, no distinction could have been made between these claims, and it is impossible to perceive any reason why she should have distinguished between them in the reservation contained in her act of cession. Do the words of the act set up this distinction?

They are "that in case the quantity of good land on the southeast side of the Ohio, which have been allowed by law for the Virginia troops upon continental establishment, should," "prove insufficient for their legal bounties, the deficiency should be made up," &c.

It cannot be doubted that Colonel Parker's warrant might have been located on the land "reserved by law on the southeast [ \* 690 ] \*side of the Ohio, for the Virginia troops upon continental establishment."

This reservation is made in general terms. It is not connected with the allotment of specific quantities for specific services. Provisions were afterwards made for this subject, and those provisions varied at different times. At one time, service was required during the war; by another act, three years service entitled the officer to his bounty, and an increased bounty was allowed for those who had served six years and upwards. Officers who resigned after serving three years, were entitled to the bounty by an act which was passed so late as the year 1782. Particular resolutions were passed afterwards, in favor of officers who were deemed by the legislature to have performed services as meritorious as if they had remained in the regular army for three years. All these warrants were equally entitled to be satisfied out of the land "reserved by law on the southeast side of the Ohio for the Virginia troops on continental establishment." They were equally "legal bounties," equally bounties "which had been engaged to them by the laws of Virginia," before her cession of the territory northwest of the Ohio; for a resolution receiving the assent of both houses, is a law as operative as an act of assembly.

If, then, under the laws of Ohio, we may consider the petition of Colonel Parker and the report of the committee as part of the record in this cause, the court of Ohio does not appear to us to have misconstrued the act of cession or any act of congress.

The decree of the supreme court of the State of Ohio sitting in and for the county of Brown is affirmed, with costs.

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**THE UNITED STATES, Appellants, v. DON FERNANDO DE LA MAZA ARREDONDO, and others, Appellees.**

6 P. 691.

Under the act of May 23, 1828, (4 Stats. at Large, 284,) concerning private land claims in Florida, the acts of public officers of Spain, in making a grant of land, were presumed to be done by legitimate authority, and to be valid, in the absence of fraud.

By the 8th article of the treaty between the United States and Spain, of February 22, 1819, (8 Stats. at Large, 252,) the lands theretofore completely granted by the king were excepted out of the grant to the United States. The original of that treaty, in the Spanish language, not corresponding precisely with the original in English, the language of the former is to be taken as expressing the intent of the grantor as to the lands granted and reserved.

The words "in possession of the lands," in the 8th article of the treaty, do not require actual occupancy; they are satisfied by that constructive possession which is attributed by the law to legal ownership.

A condition to settle two hundred families on the land granted, was held to be a condition subsequent, and that, in equity, the change of jurisdiction and circumstances had excused its performance.

An inquisition having been taken under the Spanish authorities, by which it was found that the Indians had previously abandoned the lands granted, this was held to be *res judicata*.

As respects performance of the conditions of a grant by a private grantee, the date of a treaty is the time of its final ratification.

**APPEAL** from the superior court of the eastern district of Florida.

On the 11th day of November, 1828, the appellees filed their petition in the superior court of the eastern district of Florida, against the United States, under the act of congress passed May 23, 1828.

The substance of the petition is stated in the opinion of the court. \*The grant and other proceedings annexed to [ \* 692 ] the petition were as follows:—

Don Alexander Ramirez, intendant of the army, and sub-delegate superintendent-general of the royal domain of the Island of Cuba and the two Floridas, president of the tribunal of accounts and of the board of tithes, superintendent of the department of the crusades, judge particular of vessels putting in port by stress of weather, and protector of the royal lottery, superior chief and inspector of the royal factory of segars, &c.

Whereas, Don Fernando de la Maza Arredondo and Son, merchants of this city, have presented a memorial to this intendancy-general and sub-delegate, of the 12th of November last, in which they pretend to obtain, as a gratuitous grant, a lot of land in East Florida, where they have been established, and where still remains the greater part of their family, and a great deal of their property, offering to form an establishment in the territory known under the name of Alachua, as it is adapted to the growing of cattle and the culture of provisions; said establishment to be composed of two

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hundred families, which they are to convey at their own costs, proposing other advantages which will result, not only in favor of the other inhabitants already established, and residents of the city of St. Augustine, but also in favor of the Creek and Seminole Indians living on the borders of that country, provided they obtain in absolute property the said grant, limited to four leagues of land to every point of the compass, fixing as the central point thereof the indicated tract of Alachua. And the said memorial having passed by my decree of the 12th instant, to the captain of infantry, Don Vincente Sebastian Pintado, surveyor-general of the two Floridas, for his information, which he gave on the 15th of the same month, with all the necessary information and solid reasons which demonstrate and make known the convenience and utility of providing for the increase of population in said province, without expense to the royal treasury, and of accepting the offers of the interested parties, on account of the importance of the undertaking, and of the considerable disbursements which they will have to make to carry the same into effect. In consequence thereof, by a decree of [ \* 693 ] the same day, the subject was communicated to \*the auditor fiscal of the royal domain, who, in his representations of the 17th, founded on the sovereign disposition concerning the increase of population in those possessions of his Majesty, supported the pretensions of Maza Arredondo and Son, gave his consent in order that the land which they solicit be granted to them in the terms they propose. Wherefore, on the day of yesterday, I provided the act which follows: Seen. In virtue of the royal order of the 3d of September, in this year, by which, in appointing me superintendent of the two Floridas, his Majesty commands me, in express terms, to provide for the increase of population in those provinces by every means which my prudence and zeal may dictate, with the concurrence of his lordship, the fiscal, and with the report of the surveyor-general of the said province, the tract called Alachua, in East Florida, is declared to belong to the royal domain. In consequence whereof, and in attention of the notorious integrity and fidelity, to the known capital and other good qualities of Don Fernando de la Maza Arredondo and Son, I grant to them the part which they solicit of the said tract belonging to the royal domain, in conformity to the sovereign dispositions on this matter, and with the precise condition to which they obligate themselves to establish thereon two hundred families, which ought to be Spanish, with all the requisites which are provided for, and others which will be provided by this superintendency, in virtue of the said royal order; the said establishment to begin to be carried into effect in the term of

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three years, at furthest, without which this grant will be null and void; said grant is also understood to be made without prejudice to a third party, and especially to the Indians, natives of that land, who may have returned, or may pretend to return, to make there their plantations. Let this expedient pass to the surveyor-general above mentioned, in order that he may make the corresponding plot, in conformity to his information, and the granted extent of four leagues to every wind, in a rectilineal figure, with all possible perspicuity, to avoid future doubts and litigations; which being done, let the title in form be executed, with the same plot annexed thereto, a copy of which will remain in the expedient, with the provision that the said three years allowed to commence the establishment of families are to run and be counted from \*this date; and that, [ \* 694 ] on the first families being prepared and disposed, the grantees will give notice of it, together with a list of the individuals, and mention made of the places of which they are natives, of their occupation, in order that the orders and instructions which the government and the superintendency of the royal domain in East Florida may see fit to give, be issued, and in order that an account of the whole be given in proper time to his Majesty.

The figurative plan formed by the surveyor-general aforesaid being presented, with the explanation which, in continuation, he gave of the survey and demarcation, it results that the tract of land is situated in East Florida, fifty-two miles, more or less, distant west from the city of St. Augustine, and about thirty-six miles west of the western margin of the River St. Johns; bounded on every side by vacant lands, the place known by the name of Alachua being towards the centre, which place was formerly inhabited by a tribe of the Seminole nation, which abandoned it; and according to the dimensions and form which were given to the tract in said plot, and the report annexed to it, it is specified that, as the leagues used in that province are equal to three English miles, containing each one thousand seven hundred and sixty yards, or eighty chains of Gunter, the space granted contains two hundred and eighty-nine thousand six hundred and forty-five English acres, and five sevenths of an acre, equal to three hundred and forty-two thousand two hundred and fifty arpents, and one seventh of an arpent, a measure used in West Florida, and counting for an English acre one hundred and sixty perches and sixteen and a half feet, London measure, to a linear perch, as used in the time of the British dominion, and tolerated since by our government. Wherefore, in the exercise of the faculties which have been conferred upon me by the king our lord, whom may God preserve, and in his royal name, I do grant, gratuitously,

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to the said Don Fernando de la Maza Arredondo and Son, the number of acres of land as above stated, under the limits, courses, and distances pointed out in the figurative plot, a copy of which will be annexed to this title, in order that they may possess the same as their own property, and enjoy it as the exclusive owners thereof, and in the terms exposed in my decree inserted in it.

[ \*695 ] \* In testimony whereof, I have ordered the execution of this title, signed before me, and sealed with the royal seal used in my office, and countersigned by the commissary of war, Don Pedro Carambot, his Majesty's secretary of this intendency and of the sub-delegate superintendency-general. Given in the Havana, on the 22d of December, 1817.

[ L. S. ]

ALEXANDRO RAMIREZ.

PETER CARAMBOT.

An account of the preceding title has been taken and registered in the book prepared for that purpose in the secretary's office under my charge. Havana, date as above.

CARAMBOT.

Don Juan Nepomuceno de Arrocha, honorary comptroller of the army, and secretary of the intendency of the public finance of this island, and that of Puerto Rico.

I do hereby certify that, in compliance with the decree of the 7th of this month, of the superintendent, Don Francisco Javier Ambari, made at the petition of Don Fernando de la Maza Arredondo, of the 4th instant, and filed in the secretary's office under my charge, exists the royal order of the following tenor.

His Majesty, understanding by the letters of your lordship of the 14th and 18th of August, and 21st of October, of the year last past, Nos. 18, 28, and 107, of the resolution concluded with the captain-general of that island, to regulate all that appertains to the branch of the royal finance, and to attend to the protection and advancement of the two Floridas; and having conformed himself with the advice given by the supreme council of the Indies, in their deliberations held on the 11th of August last, his Majesty has been pleased to approve, for the present, all which has been done with respect to the regulations of said branch, as also the supplies administered by the board of royal finance for the payment of the regiment of Louisiana, and other indispensable expenditures for the fortifications and defence of the cities of St. Augustine and Pensacola, authorizing your lordship, in case of necessity, to aid or supply them.

[ \*696 ] \* His Majesty, likewise, has determined, for the present, the superintendency of the two Floridas in favor of your

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lordship, as superintendent of the Island of Cuba; and, lastly, his Majesty has been pleased to command to inform your lordship, as I now do, that you facilitate the increase of the population of those provinces, by all means which your prudence and zeal can dictate, informing, as soon as possible, the motives for the absence of Don Juan Miguel de Losadas, and Don Manuel Gonzalez Almirez, from their offices.

All which I communicate to your lordship by royal order, and for your intelligence and compliance thereof. God preserve your lordship many years.

GARAY.

Madrid, September 3, 1817.

Havana, October 10, 1823.

To the Intendant of Havana. JUAN NEPOMUCENO DE ARROCHA.

From Senor Don Jose Fuertes, intendant *pro. tem.*, advising his having delivered the command to Senor Don Alex'o Ramirez, chosen by his Majesty.

Habano, July 3, 1816.

The king, our master, having been pleased to confer on Senor Don Alexander Ramirez, by a royal commission of the 5th of October, of the year last past, the posts of intendant of the army, superintendent-general sub-delegate of the royal domain, which I have provisionally exercised by royal order, he has this day taken possession of them, and I advise your excellency of it for your information, and due effects to the service of his Majesty. May God preserve your excellency many years.

JOSE DE FUERTES.

His excellency, sub-delegate of the royal domain.

The other material facts appear in the opinion of the court.

\* *Call and Wirt*, with whom also was *Taney*, (attorney- [ \*705 ] general,) for the United States.

*White and Berrien*, with whom also was *Webster*, for the appellees.

\* *BALDWIN*, J., delivered the opinion of the court. [ \*706 ]

This is an appeal from the decree of the judge of the superior court for the eastern district of the territory of Florida.

After the acquisition of Florida by the United States, in virtue of the treaty with Spain, of the 22d of February, 1819, various acts of congress were passed for the adjustment of private claims to land within the ceded territory. The tribunals appointed to decide on them, were not authorized to settle any which exceeded a league square: on those exceeding that quantity, they were directed to re-

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portion especially their opinion for the future action of congress. The lands embraced in the larger claims, were defined by surveys and plats returned; they were reserved from sale, and remained unsettled until some resolution should be adopted for a final adjudication on their validity, which was done by the passage of the [ \*707 ] law of \*the 23d May, 1828. By the 6th section it was provided, "that all claims to land within the territory of Florida, embraced by the treaty, which shall not be finally decided and settled under the previous provisions of the same law, containing a greater quantity of land than the commissioners were authorized to decide, and above the amount confirmed by the act, and which have not been reported as antedated or forged, shall be received and adjudicated by the judge of the superior court of the district within which the land lies, upon the petition of the claimant, according to the forms, rules, regulations, conditions, restrictions, and limitations prescribed to the district judge, and claimants in Missouri, by the act of the 26th May, 1824."<sup>1</sup> By the proviso, all claims annulled by the treaty, and all claims not presented to the commissioners, &c., according to the acts of congress, were excluded.<sup>2</sup>

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<sup>1</sup> 4 Stats. at Large, 52.

<sup>2</sup> By a reference to the 13th and 14th lines in the 6th section of this law, as printed in the pamphlet edition, in page 62, it reads, "according to the forms, rules, &c., prescribed by the district judge and claimants in the State of Missouri, &c., by act of congress," &c. To have taken this expression literally, would have confined the superior court of Florida to the rules prescribed by the judge of the district court of Missouri, and claimants; by acts of congress of 1824. That act authorized the judge to prescribe no rules, and it was absurd to suppose it meant that the claimants themselves should prescribe them. The court, therefore, could not but consider the evident meaning of the law to be "rules," &c., prescribed by the law itself, and was so stated in the opinion, which was delivered one day sooner than had been expected, and there was no time for revision. Satisfied that there was an error in the printing, I examined the original roll in the department of state, yesterday, and found the mistake; the word *by* had been inserted in the printed law, instead of *to*, as it was in the original roll; so that the law reads, "the rules, &c., prescribed to the district judge and claimants by the act of congress." The important bearing of this word on the power of the court and the rules of its decision, had made the insertion of this note necessary, and as it may be useful in courts at a distance from the seat of government to have a correct copy of this section of the law, the following paper is directed to be appended; 20th March, 1832. Per Mr. Justice Baldwin.

I certify that the following is a true copy of the 6th section of an act of congress, approved the 23d of May, 1828, entitled "an act supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida," namely:—

"Sect. 6. And be it further enacted, that all claims to land within the territory of Florida, embraced by the treaty between Spain and the United States, of the 22d of February, 1819, which shall not be decided and finally settled under the foregoing pro-

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\* The 7th section provided for an appeal by the claimants, and the 9th, by the United States to this court; the adjudication of the judge of the superior court having been rendered against the United States, the case comes before us by an appeal by them.

The law of 1824, which is thus referred to, and forms a part of that of 1828, furnishes the rules by which this court must be guided in assuming and exercising jurisdiction to hear and determine the claim in controversy. This law was passed to enable claimants to lands within the limits of Missouri and Arkansas, to institute proceedings to try the validity of their claims to land prior to the consummation of the cession of the territory acquired by the United States by the Louisiana treaty; and enacted, that any person, or their legal representative, claiming lands by virtue of any French or Spanish grant, concession, warrant, or order of survey, legally made, granted, or issued before the date of the 10th March, 1804, by the proper authorities, to any persons resident in the province at the date thereof, which was protected and secured by the treaty, and which might have been perfected into a complete title, under and in conformity to the laws, usages, and customs of the government under which the same originated, had not the sovereignty been transferred to the United States, may present his petition to the district court, setting forth the nature of his claim, the date of the grant, and quantity and boundary, by whom issued, and whether the claim had been submitted to any tribunal, and reported on by them, and how; praying \* that [ \*709 ] the validity of their title and claim may be inquired into and be decided by the court. The court is authorized and required

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visions of this act, containing a greater quantity of land than the commissioners were authorized to decide, and above the amount confirmed by this act, and which have not been reported as antedated or forged, by said commissioners, or register and receiver acting as such, shall be received and adjudicated by the judge of the superior court of the district within which the lan<sup>t</sup>i lies, upon the petition of the claimant, according to the forms, rules, regulations, conditions, restrictions, and limitations prescribed to the district judge and claimants in the State of Missouri by act of congress, approved May 26, 1824, entitled 'An act enabling the claimants to land within the limits of the State of Missouri and territory of Arkansas, to institute proceedings to try the validity of their claims.' Provided, that nothing in this section shall be construed to authorize said judges to take cognizance of any claim, annulled by the said treaty or the decree ratifying the same by the king of Spain; nor any claim not presented to the commissioners or register and receiver, in conformity to the several acts of congress providing for the settlement of private land claims in Florida."

Faithfully compared with the roll in this office.

Witness my hand, at the department of state, in the city of Washington, this 20th day of March, 1892.

(Signed)

DANIEL BRENT, C. C.

to hold and exercise jurisdiction of every petition presented in conformity with the provisions aforesaid, and to hear and determine the same on the petition, in case no answer be filed after due notice; or on the petition and the answer of any person interested in preventing any claim from being established, in conformity with the principles of justice, and according to the laws and ordinances of the government under which the claim originated. 3 Story's Laws U. S. 1959 1960, § 1.

A reference to the petition presented by the claimants in this case, shows that it contains a full statement of all the matters required by the 1st section of the Missouri law, excepting the condition of residence, which is not required by the act of 1828. Record, 1 to 22. It presents a claim for land in Florida embraced by the treaty, not finally settled, containing the requisite quantity of land, not reported on as antedated or forged, not annulled by the treaty, presented to and acted on by the commissioners, according to law. The superior court of Florida, then, had jurisdiction of the petition to hear and determine the same, according to the principles of justice and the laws and ordinances of Spain; and the case is now regularly before us on an appeal from their decree.

The power to hear and determine a cause is jurisdiction; it is *coram judice*, whenever a case is presented which brings this power into action; if the petitioner states such a case in his petition that on a demurrer the court would render judgment in his favor, it is an undoubted case of jurisdiction, whether on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case, is the exercise of jurisdiction conferred by the filing of a petition containing all the requisites and in the manner prescribed by law.

The proceedings on the petition are to be conducted according to the rules of equity, except that the answer on behalf of the United States need not be verified on oath. Sect. 2.

This court has often decided that by these rules are meant the well-settled and established usages and principles of the court of chancery, as adopted and recognized in their decisions, which [ \*710 ] have been acted on here, under the provisions of the \*constitution and the acts of congress. In conformity with the principles of justice and the rules of equity, then, the court is directed to decide all questions arising in the cause, and by a final decree, to settle and determine the question of the validity of the title, according to the law of nations, the stipulations of any treaty and proceedings under the same, the several acts of congress in relation thereto, and the laws and ordinances of the government from which it is alleged to be derived, and all other questions which may properly arise

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between the claimants and the United States, which decree shall, in all cases, refer to the treaty, law, or ordinance under which it is confirmed or decreed against. As these are made the basis of our decision, and this is the first final adjudication on those laws, we think it necessary to declare the sense in which we think they were intended by congress, as well as their plain legal import, agreeably to the rules of construction adopted by this court, or those which form the principle of the common law. It is not necessary to define what was meant by referring to the law of nations.

The numerous cases which have been adjudged by this, and in the circuit courts, make it wholly unnecessary to refer to the sources from which it has been extracted. By the stipulations of a treaty are to be understood its language and apparent intention manifested in the instrument, with a reference to the contracting parties, the subject-matter, and persons on whom it is to operate. The laws under which we now adjudicate on the rights embraced in the treaty, and its instructions, authorize and direct us to do it judicially, and give its judicial meaning and interpretation as a contract on the principles of justice and the rules of equity. When the construction of this treaty was under the consideration of the court in the case of *Foster and Elam v. Neilson*, 2 Pet. 99, 254, it was under very different circumstances. The plaintiff claimed a title to the land in controversy under a Spanish grant prior to the treaty, which he alleged was confirmed by the 8th article; he stood simply on his right, without any act of congress authorizing the suit, or conferring on the court any extraordinary powers. The first question which was decisive of the plaintiff's pretensions was, whether the lands in contest were within the boundaries of Louisiana, as ceded in 1803,<sup>1</sup> or within\* Florida, as ceded in 1819. The boundary between the two territories had been for many years the subject of controversy and negotiation between the American and Spanish governments, the one claiming that Louisiana extended eastward of the Mississippi to the Perdido, the other that it did not extend on that side of the river beyond the Island of Orleans, alleged to be separated from West Florida by the Iberville. To have decided in favor of the plaintiff would have been adopting the Spanish construction of the Louisiana treaty in opposition to the pretensions and course of this government, which had taken possession of and exercised the powers of government over the territory between the Mississippi and the Perdido.

This court did not deem the settlement of boundaries a judicial

but a political question,—that it was not its duty to lead, but to follow, the action of the other departments of the government; that when individual rights depended on national boundaries, “the judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided, and its duty commonly is to decide upon individual rights according to those principles which the political departments of the nation have established.” “If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous.” “We think, then, however individual judges might construe the treaty of St. Ildefonso, it is the province of the court to conform its decisions to the will of the legislature, if that will has been clearly expressed.” 2 Pet. 307.

As to the other question depending on the stipulations of the 8th article, the court declared: And the legislature must execute the contract before it can become a rule for the court. 2 Pet. 314. But this case assumes a very different aspect. The only question depending is, whether the claimants or the United States are the owners of the land in question. By consenting to be sued, and submitting the decision to judicial action, they have considered it as a purely judicial question, which we are now bound to decide as between man and man, on the same subject-matter, and by the rules which congress themselves have prescribed, of which the stipulations of any

treaty, and the proceedings under the same, form one of [ \*712 ] four distinct ones. We must, therefore, be distinctly un-

derstood as not in the least impairing, but affirming the principle of *Foster v. Neilson*. As the law giving jurisdiction to hear and determine this case, not only authorizes but requires us to decide it according to the law of nations and the stipulations of the treaty, we shall consider, “that it has been very truly urged by the counsel of the defendant in error, that it is the usage of all the civilized nations of the world, when territory is ceded, to stipulate for the property of its inhabitants. An article to secure this object, so deservedly held sacred in the view of policy as well as of justice and humanity, is always required and is never refused.” *Henderson v. Poindexter*, 12 Wheat. 535. When such an article is contained in a treaty of cession, and its meaning submitted to our consideration we shall follow up and effectuate the intention of congress by determining the subject-matter to be, whether the land in controversy was the property of the claimants before the treaty, and, if so, that its protection is as much guaranteed by the laws of a republic as the ordinances of a monarchy. In so doing, we adopt and act upon another principle, contained in the opinion of this court in the same case, in alluding to the treaty of boundary between the United States

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and Spain, concluded on the 27th of October, 1795.<sup>1</sup> "Had Spain considered herself as ceding territory, she could not have neglected a stipulation which every sentiment of justice and national honor would have demanded, and which the United States could not have refused." *Henderson v. Poindexter*, 12 Wheat. 535. Spain was not regardless of those sentiments. She did not neglect, the United States did not refuse, the stipulation in this treaty which did cede territory. In the same spirit of justice and national honor the national legislature has required its highest judicial tribunal to finally decree on the effect of this stipulation on theirs and the rights of the claimants "according to the law of nations" which is "the usage of all civilized nations." Such is the authority conferred on this court, and by the rules prescribed by the laws, which are our commission, we feel, in its language, "both authorized and required," "with full power and authority to hear and determine all questions arising in this cause relative to the title of the claimants, the extent, locality, and boundaries of the said claim, or \*other matters [ \*713 ] connected therewith, fit and proper to be heard and determined, and by a final decree, to settle and determine the same according to the law of nations,"<sup>2</sup> 2d sect. act of 1824. Congress have laid this down as the first rule of our decision in the spirit of justice and national honor which pervades this law; the court will consider it as neither the last or least of its duties to embody it in such their final decree, if in their judgment the case before it calls for its application.

Our next rule of decision is — and proceedings under the treaty. By these are to be understood the acts and proceedings of the government, or others under its authority, subsequent to the treaty, in taking possession of the ceded territory, in organizing the local government, its acts within the authority of the organic law, the promises made, the pledges given by either the general or local government. Also, the proceedings of commissioners and other officers or tribunals appointed by congress to decide and report on these claims so far as they have adopted and settled any rules and principles of decision within their powers, as guides to their judgment. These, in our opinion, are the "proceedings under the same," referred to and intended by the law, according to which we may decide, and are made a rule, a precedent for us.

The next guide is "the several acts of congress in relation thereto," clearly referring to the clause immediately preceding, "the stipulation of any treaty and proceedings under the same." By "the sev-

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<sup>1</sup> 8 Stats. at Large, 138.

<sup>2</sup> 4 Ib. 53.

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eral acts of congress in relation thereto," must be taken as referring to all the laws on the subject-matter of either, necessarily embracing lands, property, and rights depending on the stipulations and proceedings so made and had. Thus the course of the legislature points to that of the judiciary,—it must be in the same path.

Where congress have, by confirming the reports of commissioners or other tribunals, sanctioned the rules and principles on which they were founded, it is a legislative affirmation of the construction put by these tribunals on the laws conferring the authority and prescribing the rules by which it should be exercised, or which is, to all intents and purposes, of the same effect in law. It is a legislative ratification

[ \*714 ] of an act done without previous authority, and this subsequent recognition and adoption is of the same force as if done by preexisting power, and relates back to the act done.

The next rule laid down for our direction is, "and the laws and ordinances of the government from which it is alleged to be derived." The laws of an absolute monarchy are not its legislative acts,—they are the will and pleasure of the monarch expressed in various ways, if expressed in any,—it is a law; there is no other law-making, law-repealing power, call it by whatever name; a royal order, an ordinance, a cedula, a decree of council, or an act of an authorized officer; if made or promulgated by the king, by his consent or authority, it becomes, as to the persons or subject-matter to which it relates, a law of the kingdom. It is emphatically so in Spain and all its dominions. Such, too, is the law of a Spanish province conquered by England. The instructions of the king to his governors are the supreme law of the conquered colony; magna charta, still less the common law, does not extend its principles to it. *King v. Picton*, 30 St. Tr. 8vo ed. 866. A royal order, emanating from the king, is a supreme law, superseding and repealing all other preceding ones inconsistent with it. The laws of the Indies have not their force, as such, by any legislative authority vested in the council; their authority is by the express or implied expression of the royal will and pleasure; they must necessarily yield to an order prescribing a new rule, conferring new powers, abrogating or modifying previous ones.

The principle that the acts of a king are in subordination to the laws of the country, applies only where there is any law of higher obligation than his will; the rule contended for may prevail in a British, certainly not in a Spanish province. There is another source of law in all governments,—usage, custom,—which is always presumed to have been adopted with the consent of those who may be affected

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by it. In England, and in the States of this Union which have no written constitution, it is the supreme law; always deemed to have had its origin in an act of a state legislature of competent power to make it valid and binding, or an act of parliament; which, representing all the inhabitants of the kingdom, acts with the consent of all, exercises the power of all, and its acts become binding by the authority of all. 2 Co. Inst. 58; Wills, 116. So it is considered \*in the States, and by this court. 3 Dall. 400; 2 Pet. [ \*715 ] 656, 667.

A general custom is a general law, and forms the law of a contract on the subject-matter. Though at variance with its terms, it enters into and controls its stipulations as an act of parliament or state legislature. 2 Mod. 238; W. Black, 1225; Doug. 207; 2 D. & E. 263, 264; 1 H. Bl. 7, 8; 2 Binney, 486, 487; 5 Binney, 287; 2 S. & R. 17; 8 Wheat. 591, 592; 9 Wheat. 584, 591, and the cases there cited from 4 Mass. 252; 9 Mass. 155; 3 Day, 346; 1 Caines, 43; 18 Johns. 230; 5 Cranch, 492; 6 D. & E. 320; Day, 511; 5 Cranch, 33. The court not only may, but are bound to notice and respect general customs and usage as the law of the land, equally with the written law, and, when clearly proved, they will control the general law. This necessarily follows from its presumed origin: an act of parliament or a legislative act. Such would be our duty under the second section of the act of 1824, though its usages and customs were not expressly named as a part of the laws or ordinances of Spain. The first section of that act, giving the right to claimants of land under titles derived from Spain to institute this proceeding for the purpose of ascertaining their validity and jurisdiction to the court to hear and determine all claims to land which were protected and secured by the treaty, and which might have been perfected into a legal title under and in conformity to the laws, usages, and customs of Spain, makes a claim founded on them one of the cases expressly provided for. We cannot impute to congress the intention to not only authorize this court, but to require it to take jurisdiction of such a case, and to hear and determine such a claim according to the principles of justice, by such a solemn mockery of it as would be evinced by excluding from our consideration usages and customs which are the law of every government, for no other reason than that, in referring to the laws and ordinances in the second section, congress had not enumerated all the kinds of laws and ordinances by which we should decide whether the claim would be valid if the province had remained under the dominion of Spain. We might as well exclude a royal order because it was not called a law. We should act on the same principle, if the words of the second section were less explicit, and

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[ \* 716 ] according \* to the rule established in *Henderson v. Poin-dexter*. See 12 Wheat. 530, 540.

We are also required to finally decide "all other questions properly arising between the claimants and the United States."

There is but one which has arisen in this case which does not refer to the laws of nations, the treaty and proceedings under it, the acts of congress, or the laws of Spain, that is, the question of fraud in making the grant which is the foundation of the plaintiff's title; which, as well as all others, we must, by the terms of the law, decide "in conformity with the principles of justice." We know of no surer guides to the principles of justice than the rules of the common law, administered under a special law, which directs, (§ 2,) "that every petition which shall be presented under the provisions of this act shall be conducted according to the rules of a court of equity," and it does not become this tribunal to acknowledge that the decisions of any other are to be deemed better evidence of those rules or the principles of justice.

In *Conard v. Nicoll*, a great and lamented judge thus defined fraud: "The first inquiry is, what is fraud? From a view of all that has been said by learned judges and jurists upon this subject, it may be safely laid down, that, to constitute actual fraud between two or more persons to the prejudice of a third, contrivance and design to injure such third person, by depriving him of some right, or otherwise impairing it, must be shown."

He laid down three rules, which were incontrovertible:—

"1. That actual fraud is not to be presumed, but ought to be proved by the party who alleges it.

"2. If the motive and design of an act may be traced to an honest and legitimate source equally as to a corrupt one, the former ought to be preferred. This is but a corollary to the preceding principle.

"3. If the person against whom fraud is alleged should be proved to have been guilty of it in any number of instances, still, if the particular act sought to be avoided be not shown to be tainted with fraud, it cannot be affected by these other frauds, unless in some way or other it be connected with or form a part of them."

This court unanimously adopted these principles as the [ \* 717 ] maxims \* of the common law, (4 Pet. 295, 296, 297, 310,) and will be governed by them in this case in their opinion on the question of fraud.

The next subject for our consideration is the evidence on which we are to decide. The 3d section of the act is as follows: "That the evidence which has been received by the different tribunals which have been constituted and appointed by law to receive such evidence,

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and to report the same to the secretary of the treasury, or to the commissioners of the general land-office, upon all claims presented to them respectively, shall be received and admitted in evidence for or against the United States, in all trials under this act, when the person testifying is dead or beyond the reach of the court's process, together with such other testimony as it may be in the power of the petitioner, the person or persons interested in the defence made against establishing any claim, or the United States' attorney, to produce, and which shall be admissible according to the rules of evidence and the principles of law."

These provisions of the act of 1824 are applicable to this case. They have not been altered by the act of 1828, and, by the 8th section, are expressly extended to the Florida claims. They are liberal, worthy of the government which has adopted and made them the rules by which to test the rights of private claimants to portions of the land embraced in the ceded territory. From a careful examination of the whole legislation of congress on the subject of the Louisiana and Florida treaties, we cannot entertain a doubt that it has from their beginning been intended that the titles to the lands claimed should be settled by the same rules of construction, law, and evidence, in all their newly acquired territory; that they have adopted as the basis of all their acts the principle that the law of the province in which the land is situated is the law which gives efficacy to the grant, and by which it is to be tested whether it was property at the time the treaties took effect.

The United States seem never to have claimed any part of what could be shown by legal evidence and local law to have been severed from the royal domain before their right attached. In giving jurisdiction to the district court of Missouri to decide on these claims, the only case expressly excepted is that of Jacques Clamorgan (in § 12, 3 Story, Laws U. S. 1964,) <sup>1</sup> and in the corresponding law as to Florida; those annulled by the \*treaty, and [ \*718 ] those not presented in time, according to the acts of congress, (§ 6, pamphlet 62.)

The United States have, by three cessions, acquired territory within which there have been many private claims to land under Spanish titles. The first, in point of time, was by the compact with Georgia, in 1802, by the terms of which it was stipulated "that all persons who, on the 27th October, 1795, were actual settlers within the territory thus ceded, shall be confirmed in all their grants, legally and

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<sup>1</sup> 4 Stats. at Large, 55.

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fully executed prior to that day by the former British government of West Florida, or by the government of Spain." 1 Laws, 489.

The stipulations of the treaties by which they acquired Louisiana and Florida, contained provisions of a similar nature as to claims to land under Spain before the cession.

The whole legislation of congress, from 1803 to 1828, in relation to the three classes of cases, so far as respected Spanish titles, is of an uniform character on cases of a corresponding description. The rules vary according to the kind of title set up. Distinctions have been made in all the laws between perfect or complete grants, fully executed, or inchoate incomplete ones, where a right had been in its inception, under or by color of local law or authority, but required some act of the government to be done to complete it. Both classes have been submitted to the special tribunals appointed to settle, to report finally or specially upon them; and the claimants have, under certain circumstances, been permitted to assert their rights in court by various laws, similar in their general character, but varying in detail to meet the cases provided for.

They are too numerous to be noticed in detail—some will be referred to hereafter; but it is sufficient for the present to observe, that from the whole scope and spirit of the laws on the subject of Spanish titles, the intention of congress is most clearly manifested, that the tribunals authorized to examine and decide on their validity, whether special or judicial, should be governed by the same rules of law and evidence in their adjudication on claims of the same given character. The 2d and 3d sections of the Missouri act of 1824, the 1st, 6th, and 8th of the Florida act of 1828, can admit of no other construction. It was within the discretion of the

legislature to select the cases to be submitted to either [ \*719 ] tribunal; \*they have directed that no claims should be decided on by a special tribunal which is for a quantity greater than one league square; they had reserved to themselves the disposition of those for a larger amount, and finally have devolved on this court their final decision. These are good reasons for the jurisdiction being conferred; but the selection of this tribunal for a final and conclusive adjudication on the large claims, affords neither an indication of the intention of congress, or furnishes us any reason that, in the exercise of that jurisdiction, we should consider that "the principles of justice," the rules of a court of equity, "the law of nations," of treaties, "of congress," or of "Spain," the rules of evidence, or the "principles of law," can be at all affected by the magnitude of the claim under consideration. The laws which confer the authority and point to the guides for its exercise, make no

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such discrimination, and every "principle of justice" forbids it. By the laws of congress on this subject, however, we must be distinctly understood as not comprehending those which have been passed on special cases or classes of cases, over which they had delegated to no tribunal power to decide, but which were disposed of according to circumstances of which they chose to be the exclusive judge. There is another duty imposed on the court by the 2d section of the act of 1824, after making a final decree; "which decree shall, in all cases, refer to the treaty, law, or ordinance, under which it is confirmed or decreed against;" so that we may make a final decree to settle and determine the validity of the title according to either the law of nations, "the stipulations of any treaty, law, or ordinance" referred to; and if, by either the one or more rules of decision thus prescribed, we shall be of opinion that the title of the claimants was such as might have been perfected into complete title under and in conformity to the laws of Spain, if the sovereignty of the country had not been transferred to the United States, in the words of the Missouri law of 1824; or which were valid under the Spanish government, or by the laws of nations, and which were not rejected by the treaty ceding the territory of East and West Florida to the United States, in the words of the Florida laws of 1822, and 1823, 3 Story, 1870,<sup>1</sup> 1907,<sup>2</sup> referred to and adopted in that of 1828, we can decree finally on the title. These laws being in *pari materia*, and referred to in the one giving us jurisdiction, [ \* 720 ] must be taken as one law, *reddendo singula singulis*.

The counsel of the United States have considered the merits of this case as resting mainly, if not wholly, on the 8th article of the treaty; but the law compels us to take a view of it much less limited. That article names only grants; and if we decide alone on it, we must agree against the claim, unless we think the title good under it; though if it was for a quantity not exceeding a league square, any other tribunal would confirm it. This would be making a distinction so unworthy a just legislature, that we shall not impute to them the intention of directing it to be the rule of our action. We shall certainly not adopt it unless it is clearly imposed by the authority of a law expressed in terms admitting of no doubt.

The 4th section of the Florida act of 1822, 3 Story, 1870, enacts that every person claiming title to lands under any patent, grant, concession, or order of survey, dated previous to 24th January, 1818, which were valid under the Spanish government, or the laws of nations, and which were not rejected by the treaty, shall file his

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her, or their claim, &c. "And said commissioners shall proceed to examine, and determine on the validity of said patents, grants, concessions and orders of survey, agreeably to the laws and ordinances heretofore existing of the governments making the grants respectively, having due regard in all Spanish claims, to the conditions and stipulations contained in the 8th article of the treaty of 22d of February," 1819. The intention of this provision cannot be misunderstood. Due regard must be had to this article; it must be considered, weighed, and deliberated upon in connection with the other matters which form the rule of decision. A decree may be founded upon the stipulations of the treaty and proceedings under it, or it may be independent of them, according to the laws of nations, congress, or Spain; each of which is of as high obligation as the treaty, and on either of which alone we may find our decree. Though the term "law of nations" is not carried into the second clause of the 4th section of the act of 1822, yet we consider it a rule of decision for the reasons before stated, and on the authority of *Henderson v. Poindexter*, 12 Wheat. 530, the manifest object of the law in directing those claims to be filed, which are valid by the [ \* 721 ] \*law of nations, is that they shall be adjudicated on accordingly by the authorized tribunal. To impute to congress the intention of directing them to be filed, described, and recorded, and forever barred if not so recorded, and of ordering the tribunal to examine and decide on their validity, and in the same sentence withhold from the same tribunal the power of doing it, by the principles of the same law on which they were founded, and by which they were made valid, would be utterly inconsistent with every rule of law. The 6th section of the act of 1828, is still more comprehensive; it provides that all claims to land, within the territory of Florida, embraced by the treaty of 1819, which shall not be decided and finally settled under the foregoing provisions of this act, containing a greater quantity of land, &c., and which have not been reported on as antedated or forged by the commissioners, not annulled by the treaty and reported on by the commissioners, shall be received and adjudicated by the judge of the superior court of the district, (see pamphlet, 62.) This includes all claims, the former laws included only those specially designated, this embraced all not before decided, and not finally settled, with only two exceptions, one as to quantity, the other as to date and forgery. Whether then the present claim is by patent, grant, concession, warrant, or order of survey, or any other act which might have been perfected into a complete title, by laws, usages, and customs of Spain, is immaterial as to our power to hear and determine. The 5th section of the Missouri act, (3 Story, 1962,)

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and the 12th section of the Florida act (pamphlet, 63,) finally bars at law and in equity all claims to lands, tenements, and hereditaments within their purview, which are not brought by petition before the court. They are, of course, not cognizable by them.

We now proceed to consider the validity of the present claim. The claimant offered and gave in evidence an original grant from Don Alexander Ramirez, styling himself "intendant of the army, sub-delegate, superintendent-general of the royal domain of the Island of Cuba, and the two Floridas," &c. &c. It purported to convey the land in controversy to Arredondo and Son, to have been made in the exercise of the faculties which had been conferred on Ramirez by the king; it was made in the royal name, for the number of acres of land, \*under the limits, [ \*722 ] courses, and distances pointed out in the figurative plot, in order that they may possess the same as their own property, and enjoy it as the exclusive owners thereof; and in the terms mentioned in the decree therein recited, with an absolute dominion over and full property in it. The grant purports to be made on great deliberation and in solemn form, as a sentence in the official capacities which were assumed, "upon examination and in virtue of the royal order of 3d of September of the present year, in which his Majesty having appointed me superintendent of the two Floridas, desires me, in the strongest terms, to procure the settlement of these provinces by every means which my zeal and prudence can suggest." "In conformity with the fiscal (the attorney-general) and the report made by the surveyor-general, I declare as crown property the territory of Alachua," (the lands in question.) The grant then followed, "signed with my hand, sealed with the royal arms, as used in my secretary's office, and countersigned by the commissary at war, Don Pedro Cerambat, secretary for his Majesty in this intendency," and "registered in the book for that purpose in the office under the secretary's charge." No objection appears to have been made to the admission of this paper in evidence; its genuineness seems not to have been contested; no attempt was made to impeach it as antedated or forged, and its due execution in all the forms known to the local government was unquestioned. It was therefore before the court below, and is so here, at least, *prima facie* evidence of a grant of the land it describes to the claimants; the rules of evidence and the principles of law give it this effect, and so it must be considered. Here, an important question arises: Whether the several acts of congress relating to Spanish grants do not give this grant and all others which are complete and perfect in their forms, "legally and fully executed," a greater and more conclusive effect as evidence of a grant by proper authority.

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It is but a reasonable presumption that congress, in legislating on the subject of Spanish grants in the three territories which they have acquired since 1802, and in devising and providing efficient means for the ascertaining and finally settling all claims of title under them by persons asserting that the lands they claimed had [ \* 723 ] been severed from the public domain before the cessions of the territory to the United States; that when they have, by a series of laws from 1803 to 1828, authorized special and subordinate tribunals to decide on claims to the extent of a league square, inferior courts to decide on all claims to any amount, and finally, if no appeal is taken; and this court to pronounce a final decree on appeal, which may separate millions of acres from the common fund; they would have made what was deemed adequate provision to guard the public from spurious grants, by prescribing for the various tribunals authorized to decide on "claims, such rules of evidence applicable to these grants as would secure the interest of the nation from fraud and imposition." Yet, in their whole legislation on the subject, (which has all been examined,) there has not been found a solitary law which directs that the authority on which a grant has been made under the Spanish government should be filed by a claimant, recorded by a public officer, or submitted to any tribunal appointed to adjudicate its validity and the title it imparted; congress has been content that the rights of the United States should be surrendered and confirmed by patent to the claimant, under a grant purporting to have emanated under all the official forms and sanctions of the local government. This is deemed evidence of their having been issued by lawful, proper, and legitimate authority, when unimpeached by proof to the contrary.

In providing for carrying into effect the stipulations of the compact of cession with Georgia, the 5th section of the act of 1803<sup>1</sup> provides that all persons claiming land pursuant thereto, should, before the 1st March, 1804, deliver to the register of the land-office, in the proper district, a notice containing a statement of the nature and extent of his claim, and a plot thereof; also, for the purpose of being recorded, every grant, order of survey, deed of conveyance, or other written evidence of his claim; in default whereof all his right, so far as depended on the cession, or the law, was declared void, forever barred, and the grant inadmissible in any court in the United States against any grant from them. (2 Story, 894, 895.) By the 6th section, it was provided that when it should be made to appear to the commissioners that the claimant was entitled to a tract of land under the cession in virtue of a Spanish or British

<sup>1</sup> 2 Stats. at Large, 229.

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grant legally and fully executed, they \* were directed to [ \* 724 ] give him a certificate which amounted to a relinquishment of the claim of the United States forever, when recorded. The fact which gave to the recorded certificate of the commissioners the effect of a patent, was the existence of a grant; the legality and fulness of its execution only was required to be made to appear. No inquiry was directed to be made as to the authority by which it was done; the United States were too just to exact from the grantees of land under an absolute colonial government what no court requires from one who holds lands under the grant of the United States or of a State fully executed; or if inchoate, never compels a claimant to produce the authority of the officer who issues or executes a warrant or order of survey; it is always presumed to be done regularly till the contrary appears, or such reasons are offered for doubting its authenticity, as are sufficient in law to rebut the legal presumption. By the 1st section of the supplementary act of 1804, claimants by complete British or Spanish grants are required to record no evidence of their claim except the original grant or patent with the warrant or order of survey and the plat; the other papers were to be deposited with the register of the land office, in order to be laid before the commissioners for their consideration. (Act of March 27, 1804,<sup>1</sup> 2 Story, 952.)

As no law required the exhibition of the authority under which a grant warrant, or order of survey was made; as it formed a part of the evidence of title to be recorded, deposited, or acted on by the commissioners, they were not authorized to call for it before making their decision.

The grant legally and fully executed was competent evidence of the matters set forth in it, and as none other was necessary it was in effect conclusive. But congress thought it proper to authorize the commissioners not to confine their examination to the mere execution of the alleged grant. By the 3d section of the same law it is provided as follows: "Or whenever either of the said boards shall not be satisfied that such grant, warrant, or order of survey did issue at the time it bears date, the said commissioners shall not be bound to consider such grant, warrant, or order of survey as conclusive evidence of the title, but may require such other proof of its validity as they may think proper." Nothing can more clearly manifest the understanding of congress that such [ \* 725 ] grant, &c., was conclusive evidence of title, and that the commissioners were not, under the existing laws, at liberty to require

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from the claimants any other proof, than their conferring on them by express words the power of doing so. *Expressio unius est exclusio alterius*, is an universal maxim in the construction of statutes.

In the law of the succeeding session,<sup>1</sup> passed for ascertaining and adjusting the titles and claims to land within the territory of Orleans and district of Louisiana, it was directed that the evidence of claims to land, should be recorded; but there was this proviso in the 4th section: "That where lands are claimed by virtue of a complete French or Spanish grant, as aforesaid, it shall not be necessary for the claimant to have any other evidence of his claim recorded, than the original grant or patent, together with the warrant or order of survey, and the plot." Other provisions follow, similar to those in the preceding law relating to claims included in the articles of agreement with Georgia. (2 Story, 967, 968.) By the 5th section, the commissioners are directed to "decide in a summary manner, according to justice and equity, on all claims filed with the register and recorder, in conformity with the provisions of this act, and on all complete French or Spanish grants, the evidence of which, though not thus filed, may be found of record on the public records of such grants, which decision shall be laid before congress in the manner hereinafter directed, and be subject to their determination thereon." The commissioners shall not be bound to consider such grant, warrant, or order of survey as conclusive evidence of title, when they were not satisfied that it issued at the time it bears date, but that the same is antedated or otherwise fraudulent; they may then require such other proof of its validity as they may think proper. By proof of validity must be understood of its genuineness and authenticity, and that it is not fraudulent, so as to satisfy themselves as to those doubts which authorized them to require further proof than the grant itself, of its legal, full, and fair execution, not of the authority of the officer who made it; no law gives power to exact proof of that. This act of congress proves that, by considering the recorded grant as conclusive evidence of title, (which cannot be without [ \*\*:26 ] power in \* the grantor,) unless it is antedated or otherwise fraudulent, the authority of the officer making it was presupposed.

The act of 1822, for ascertaining claims and titles to land in the territory of Florida, (3 Story, 1870,) directs all persons claiming title to lands under any patent, grant, concession, or order of survey, to file before the commissioners their claim, "setting forth its situation and boundaries, if to be ascertained, with their deraignment of title,

<sup>1</sup> 2 Stats. at Large, 324.

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where they are not the grantees or original claimants," which shall be recorded, &c. Section 4. This dispenses with the filing the warrant or order of survey, the survey or plot required by the laws relating to both the Georgia and Louisiana claims, as they need not set forth or file their deraignment of title, where they claim by a grant, patent, &c., to themselves. The direction of the law can apply only to such grant or patent, &c., this being filed and recorded; the 5th section enacts, "that the commissioners shall have power to inquire into the validity and justice of the claims filed with them, and if satisfied that said claims be correct and valid, shall give confirmation to them, which shall operate as a release of any interest which the United States may have." The 2d section of the act of 1823, supplementary to the last, dispenses with the necessity of producing in evidence, before the commissioners, the deraignment of title from the original grantee or patentee; but the commissioners shall confirm every claim in favor of actual settlers at the time of the cession, &c., when the "quantity claimed does not exceed 3,500 acres." (3 Story, 1907.) By the act of 1824,<sup>1</sup> for extending the time limited for the settlement of private land-claims in the territory of Florida, "the claimants shall not be required to produce in evidence a deraignment of title from the original grantee or patentee, but the exhibition of the original title-papers, agreeably to the 4th section of the act of 1822, with the deed or devise to the claimant, and the office abstracts of the intermediate conveyances for the last ten years preceding the surrender of Florida to the United States; and when they cannot be produced, their absence being accounted for satisfactorily, shall be sufficient evidence of the right of the claimant or claimants, to the land so claimed, as against the United States." (3 Story, 1935, § 2.)

\* It is thus clearly evidenced, by the acts, the words, and [ \* 727 ] intentions of the legislature, that, in considering these claims by the special tribunals, the authority of the officer making the grant, or other evidence of claim to lands, formed no item in the title it conferred; that the United States never made that a point in issue between them and the claimants to be even considered, much less adjudicated. They have submitted to the principle which prevails as to all public grants of land, or acts of public officers, in issuing warrants, orders of survey, permission to cultivate or improve, as evidence of inceptive and nascent titles, which is, that the public acts of public officers purporting to be exercised in an official capacity and by public authority, shall not be presumed to be an usurped, but

<sup>1</sup> 3 Stats. at Large, 6.

a legitimate authority, previously given or subsequently ratified, which is equivalent. If it was not a legal presumption that public and responsible officers claiming and exercising the right of disposing of the public domain, did it by the order and consent of the government, in whose name the acts were done, the confusion and uncertainty of titles and possessions would be infinite, even in this country, especially in the States whose tenures to land depend on every description of inceptive, vague, and inchoate equities, rising in the grade of evidence, by various intermediate acts, to a full and legal confirmation, by patent, under the great seal.

To apply the principle contended for to the various papers which are sent from the general or the local land-offices, as instructions to officers under their direction, or evidence of incomplete title to land, by requiring any other evidence of the authority by which it was done than the signature of the officer, the genuineness of the paper, proved by witnesses, or authenticated by an official seal, would be not only of dangerous tendency, but an entire novelty in our jurisprudence, as "a rule of equity or evidence," or "principle of law or justice." The judicial history of the landed controversies, under the land laws of Virginia and North Carolina, as construed and acted on within those States, and in those where the lands ceded by these States to the United States lie, and Pennsylvania, whose land tenures are very similar in substance, in all which the origin of titles is in very general, vague, inceptive equity, will show the universal adoption of the rule that the acts of public officers in disposing of public lands, by color or claim of public authority, are evidence thereof until the contrary appears by the showing of those who oppose the title set up under it, and deny the power by which it is professed to be granted. Without the recognition of this principle, there would be no safety in title-papers, and no security for the enjoyment of property under them. It is true that a grant made without authority is void under all governments; (9 Cranch, 99; 5 Wheat. 303;) but in all the question is on whom the law throws the burden of proof, of its existence, or non-existence. A grant is void, unless the grantor has the power to make it; but it is not void because the grantees does not prove or produce it. The law supplies this proof by legal presumption, arising from the full, legal, and complete execution of the official grant, under all the solemnities known or proved to exist or to be required by the law of the country where it is made and the land is situated.

A patent under the seal of the United States, or State, is a conclusive proof of the act of granting by its authority; its exemplification is a record of absolute verity. *Patterson v. Winn*, 5 Pet. 241.

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The grants of colonial governors, before the Revolution, have always been, and yet are, taken as plenary evidence of the grant itself, as well as authority to dispose of the public lands. Its actual exercise, without any evidence of disavowal, revocation, or denial by the king, and his consequent acquiescence and presumed ratification, are sufficient proof, in the absence of any to the contrary, (subsequent to the grant,) of the royal assent to the exercise of his prerogative by his local governors. This, or no other court, can require proof that there exists in every government a power to dispose of its property; in the absence of any elsewhere, we are bound to presume and consider that it exists in the officers or tribunal who exercises it, by making grants, and that it is fully evidenced by occupation, enjoyment, and transfers of property, had and made under them, without disturbance by any superior power, and respected by all coördinate and inferior officers and tribunals throughout the state, colony, or province where it lies.

A public grant, or one made in the name and assumed authority of the sovereign power of the country, has never been considered as a special verdict, capable of being aided by no [ \*729 ] inference of the existence of other facts than those expressly found or apparent by necessary implication, an objection to its admission in evidence on a trial at law, or a hearing in equity, is in the nature of a demurrer to evidence on the ground of its not conducing to prove the matter in issue.

If admitted, the court, jury, or chancellor, must receive it as evidence both of the facts it recites and declares, leading to and the foundation of the grant, and all other facts legally inferable by either from what is so apparent on its face. Taking, then, as a settled principle, that a public grant is to be taken as evidence that it issued by lawful authority, we proceed to examine the legal effect of a Spanish grant in adjudicating on their validity, by the principles of justice in a court; and by the rules of equity, evidence, and law, directed by the act of 1824, which forms a part of the law under which their validity is submitted to our judicial consideration.

The validity and legality of an act done by a governor of a conquered province, depends on the jurisdiction over the subject-matter delegated to him by his instruction from the king, and the local laws and usages of the colony, when they have been adopted as the rules for its government. If any jurisdiction is given, and not limited, all acts done in its exercise are legal and valid; if there is a discretion conferred, its abuse is a matter between the governor and his government, &c.; King *v.* Picton, late governor of Trinidad, 30 St. Tr. 869-871.

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It is an universal principle, that, where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion; the acts so done are binding and valid as to the subject-matter; and individual rights will not be disturbed collaterally for any thing done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person denying its validity, are, power in the officer, and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer; whether executive, (1 Cranch, 170, 171,) [ \* 730 ] legislative, (4 Wheat. 423; 2 Pet. 412; 4 Pet. 563,) \*judicial, (11 Mass. 227; 11 S. & R. 429; adopted in 2 Pet. 167, 168,) or special, (20 J. R. 739, 740; 2 Dow. P. Cas. 521, &c.,) unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law.

The principles of these cases are too important not to be referred to, and though time does not admit of their extraction and embodying in our opinion, we have no hesitation in declaring that they meet with our entire concurrence, so far as applicable to this case. But there are other cases which have been decided by this court, which have, in our opinion, so direct a bearing on the effect and validity of the grant in question, as to deserve a close examination; they will be considered in their order.

In Polk's lessee against Wendell, various objections were made to the validity of a grant from the State of North Carolina, as not having issued under the authority of law. The court laid down this general principle: "But there are cases in which a grant is absolutely void; as when the State has no title to the thing granted, or where the officer had no authority to issue the grant," (9 Cranch, 99; repeated in the same case, 5 Wheat. 303.) In a succeeding part of their opinion, they observe, in allusion to the law of the State: "This act limits the amount for which an entry may be made, but the same person is not in this act forbidden to make different entries, and entries were transferable. No prohibition appears in the act which should prevent the assignee of several entries, or the person who has made several entries, from uniting them in one survey and patent." 9 Cranch, 87. "The laws for the sale of public lands provide many guards to secure the regularity of grants, to protect the incipient rights of individuals, and also to protect the State from imposition. Officers are appointed to superintend the business, and rules are framed prescribing their duty. These rules are in general directory, and where all the proceedings are completed, by a patent issued by

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the authority of the State, a compliance with these rules is presupposed. That every prerequisite has been performed, is an inference properly deducible, and which every man has a right to draw from the existence of the grant itself. It would therefore be extremely unwarrantable for any court to avoid a grant for any irregularities in the conduct of those who are appointed by the government

\* to supervise the progressive course of a title from its commencement to its confirmation in a patent; " 9 Cranch, 99.

In a review of their opinion, it is laid down: " As to what validity shall be given to the grants emanating from North Carolina, the decision places it upon the statutes of North Carolina; and although an opinion is expressed, that North Carolina could make no new grants after the cession, to congress, who could entertain a doubt upon the question? The right referred to here, was to perfect incipient grants; but what restraint is imposed on her discretion, or what doubt suggested of her good faith in executing that power? It will be perceived that, as to irregularities committed by the officers of government, prior to the grant, the court does not express a doubt but that the government, and not the individual, must bear the consequences resulting from them." 5 Wheat. 304. They refer to the rule as to the patents laid down in the former case, and add: " But in admitting that the grant shall support the presumption that every prerequisite existed, it necessarily admits that a warrant shall be evidence of the existence of an entry; nor is it by any means conclusive to the contrary, that the entry does not appear upon the abstracts of entries in Washington county, recorded in the secretary's office; on the contrary, if the warrants issued are signed by the entry-taker, it is conclusive that the locations were received by him; and if he omitted to enter them, his neglect ought not to prejudice the rights of him in whose favor the warrants were issued." 5 Wheat. 304, 305. This is a very important principle applying to all imperfect grants, concessions, warrants, and orders of survey. That the production of either is legal evidence, from which the legal presumption arises, that all preceding acts necessary to give it legal validity, have been done before it issued.

Another equally so was established in that case: " There was one point made in the argument of this case, which, from its general importance, deserves our serious attention, and which may have entered into the views of the circuit court in making their decision. It was, whether admitting this grant to be void, innocent purchasers, without notice, holding under it, should be affected by its nullity. On general principles it is incontestable, that a grantee can convey no more than he possesses. Hence, those who come in under the holder

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[ \* 732 ] of a void \*grant, can acquire nothing; but it is clear that the courts of Tennessee have held otherwise. Yet the North Carolina act of 1777, certainly declares grants attained by fraud to be absolutely void; and the same result must follow, where the State has relinquished its power to grant, or no law exists to support the validity of the grant. But it seems that the courts of Tennessee have adopted this distinction, that grants in such cases shall be deemed void only as against the State, and not then until adjudged so by some process of law. If this be the settled law of Tennessee, we are satisfied that it should rest on the authority of adjudication." 5 Wheat. 309. This evidences the respect paid by this court to local common law, which is but custom and usage, although opposed to general principles which are incontestable. "Hence this court has never hesitated to conform to settled doctrines of the State on landed property, when they are fixed and can be satisfactorily ascertained; nor would it ever be led to deviate from them in any case that bore the semblance of impartial justice." 5 Wheat. 302. The same principle applies to those of a territory, and to Florida, by the act of 1824. In Hoofnagle against Anderson, a patent had issued for lands in the Virginia military district, in Ohio, on a continental warrant, issued by the register of the land-office, without authority by law or a certificate of the governor, for state services. The question on which the title depended was, whether the illegality of the warrant could be inquired into after the grant by a patent; on which the opinion of the court was given in these words: "But this reference to the certificate of the executive, appears on the face of every warrant, and contains no other information than is given by law; the law requires this certificate as the authority of the register. It is considered as a formal part of the warrant. These warrants are, by law, transferable. They are proved by the signature of the officer and seal of office. The signature and seal are considered as full proof of the rights expressed in the paper; no inquiry is ever made into the evidence received by the public officer. If the purchaser of such a paper takes it subject to the risk of its having issued erroneously, there ought to be some termination to this risk. We think it ought to terminate when the warrant is completely merged in a patent, and the title consummated without having encountered an adversary claim." 7 Wheat. 217, 218.

[ \* 733 ] \*A reference to the decisions of this court on titles in Florida, will show how they have been heretofore considered: "It is true that the act of the 3d of March, 1803, although making no express provision in favor of British or Spanish grants, unaccompanied with possession, does seem to proceed upon the

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implication that they are valid, recognizing the principle that a change of policy produces no change in individual property, yet it imputes to them only a modified validity ; " (referring to the necessity of their being recorded, and the consequence of not doing it.) *Harcourt against Gaillard*, 12 Wheat. 528. Had that claim been so recorded, and come before the court under a law and circumstances similar to this, there could have been no doubt of what its opinion would then have been. In the next case, after reciting the 1st section of the act of 1803, the court say : " This section places those persons who had obtained a warrant or order of survey, before 27th October, 1795, on equal ground with those whose titles were completed." After reciting the residue of that act, and the preceding one of 1804, they express a very strong opinion that a British or Spanish grant was cognizable before the commissioners appointed under those laws, though held by persons not residents of the country. That the commissioners might have decided in favor of its validity, and that such decision would have been conclusive. *Henderson v. Poindexter*, 12 Wheat. 536 to 543. The claim in that case was for 1,500 acres ; but the title was not recorded or the claim laid before the commissioners, and it was not of course embraced in the provisions of any act of congress authorizing any court to decide on the title. We conclude this review of the acts of congress and the decisions of this court, with repeating their words in *Rutherford v. Green* : " Whatever the legislative power may be, its acts ought never to be so construed as to subvert the rights of property, unless its intention to do so shall be expressed in such terms as to admit of no doubt, and to show a clear design to effect the object. No general terms intended for property, to which they may be fairly applicable and not particularly applied by the legislature, no silent implied and constructive repeals ought ever to be understood as to devest a vested right." 2 Wheat. 203. The course of the argument, the situation of the country in which the land \* is situated, and the numerous titles [ \*734 ] depending on the principles which have been so fully discussed, has induced us to meet them fully and explicitly — they will narrow the scope of argument in future cases.

The claimants in this case did not rest their title merely on the grant. It appeared in evidence, by authentic documents, that, in 1816, a controversy arose between the captain-general and the intendant of the Island of Cuba, as to the superintendency of the royal domain of the Floridas, which, being referred to the king, he, by a royal order of the 3d September, 1817, conferred it on the intendant, Ramirez, " commanding him therein to facilitate the increase of the population of those provinces by all the means which his zeal

and prudence could dictate." This is the order recited in the grant, and the authority under which it was made, with the general superintendency of the domain of the provinces, the local authorities acting under his direction and supervision, and acting under the command contained in the order, we can have no hesitation in saying that the grant in question was within the authority thus conferred. This order was a supreme law, superseding all others so far as it extended; its object was to increase the settlement and population of the whole province, which could only be done by corresponding grants of land adequate in extent to their desired effect. The power to do it was ample, and the means confided to the discretion of the officer, which was not limited. We cannot say that in executing this grant, he has acted without authority. Our opinion, therefore, is that, both on the general principles of law and the acts of congress, the grant is perfect and valid, and even if a special authority was requisite, that it is conferred by the royal order referred to. The bearing of the law of nations on such a title, and property thus acquired, while the province was in the possession and undisputed dominion of Spain, is manifest according to its principles, recognized and affirmed by this court; 12 Wheat. 535, before cited at large; no article of the treaty professes to abrogate these rights, and all the laws of congress treat them as still subsisting, and they are now referred to our final decree by a special law. This relieves the court

from the difficulty in which they found themselves in giving [ \* 735 ] a construction to the treaty in the case of *Foster and Elam v. Neilson*. A treaty is in its nature a contract between "two nations, not a legislative act. It does not generally effect of itself the object to be accomplished, especially so far as its object is infra territorial, but is carried into effect by the sovereign powers of the parties to the instrument; when either of the parties engages to perform a particular act, the treaty addresses itself to the political not the judicial department, and the legislature must execute the contract before it can become a rule for the court." 2 Pet. 314. But the court are, in this case, authorized to consider and construe the treaty, not as a contract between two nations, the stipulations of which must be executed by an act of congress before it can become a rule for our decision, not as the basis and only foundation of the title of the claimants, but as a rule to which we must have a due regard, in deciding whether the claimants have made out a title to the lands in controversy—a rule by which we are neither directed by the law or bound to make our decree upon, any more than on the laws of nations, of congress, or of Spain. The act of 1824 and 1828 authorize and require us to decide on the pending titles on all

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the evidence and laws before us. Congress have disclaimed its decision as a political question for the legislative department to decide, and enjoined it on us as one purely judicial. Taking, then, the treaty as a legislative act, an item of evidence, or a rule of decision, relied on by one or both parties to this suit, we consider the 2d article as ceding to the United States only what of the territories belonged to Spain—that no land which had been severed from the royal domain by antecedent grants, which were valid by the laws of Spain, and created any right of property to the thing granted in the grantee; passed to the United States—such lands were not liable to subsequent appropriation by a subsequent grant. Considering the treaty as a legislative act, and applying to it the same rules, “the proposition is believed to be perfectly correct, that the act of 1783, of N. C., which opened the land-office, must be construed as offering for sale those lands only which were then liable to appropriation, not those which had before been individually appropriated.” 2 Wheat. 203. So must the treaty be construed; and if a question arises what lands were ceded, the answer is found in the 2d article:

\* “vacant lands,” not those which, in the language of this [ \* 736 ] court, had been individually appropriated, and were not the subjects of a hostile and adversary grant. The renunciation in the 3d article, by both parties, was only of their respective rights, claims, and pretensions to the territory renounced; neither government had any rights to renounce over the lands to which a title had been conveyed to their citizens or subjects respectively. The United States do not come into court claiming this cession and renunciation as vesting them with the whole territory in full dominion, in their sovereign capacity, with liberty to confirm previous appropriations of parts of it or not, at their pleasure; but require us to finally decide between them and the claimants as grantees from the same grantor; which grant carries the title to the land. Thus deciding between the parties on these articles of the treaty, and in conformity to the laws, rules, and principles before established, we should be of opinion that the land embraced in the grant was no longer a part of the royal domain at the date of the treaty, but private property; land not vacant, but appropriated by a prior valid deed. The 8th article was evidently intended for the benefit of those who held grants and were considered as proprietors of land in Florida; to give it a construction which would narrow and limit rights thus intended to be secured, would deprive them of the benefit of the fair construction of the 2d and 3d articles of the treaty, and leave them in a worse situation than if the 8th had been omitted altogether. To adopt one so severe and unjust would require words and an evident intent clearly

expressed — making it imperative on our judgment to devest rights already vested.

The original treaty has been examined in the department of State — it is executed as an original, and headed "original" in both languages — it cannot have escaped our attention that it relates to the territory ceded, the boundaries between those of the two governments, the mutual renunciations, and the rights of the inhabitants of the ceded territories. There is an obvious reason for its being in Spanish as well as in English ; the king had a direct interest, so far as affected his own dominions adjoining the United States, and a laudable desire to protect the inhabitants of the ceded provinces in

all their rights and property. His honor was concerned [ \*737 ] most deeply in not doing \*an act which should deprive his subjects of what he had granted to them ; by making a cession of the territory to a powerful nation. Not content with ceding and renouncing only what belonged to himself, he was desirous of expressing his intention of preserving his faith, by an article which should show it to be not to leave the confirmation of grants by lawful authority at the pleasure of the United States. Before the execution of the treaty, there was inserted a stipulation in Spanish by which the ceded territory should pass into the hands of the United States with the declared intention, on the part of the king of Spain, that the grants referred to operated *in praesenti* as an exception and reservation of lands granted in his name and by his authority, using words which expressed his intention, in his own language, that the grants were ratified and confirmed by both governments in the very act of cession, subject to no future contingency. This furnishes a powerful and obvious reason for inserting this article in Spanish, so that the intention would be clearly understood by words denoting it in a manner not to be mistaken whenever any doubt should arise ; \*and whenever the treaty should be produced as evidence of the cession, or for any other purpose, there should always appear in the native language of his then or former subjects, full evidence of his declared intention to protect their rights acquired by his grants, pledging his honor and faith for their security.

His minister was not willing to trust so important a matter to a treaty only in the English language. The present situation of the holders of the grants, the state of the country, the opinion of this court in *Foster v. Neilson*, 2 Pet. 254, and the argument in this cause, show the wisdom and justice which prompted him to express the intention of the king in his own language; and that of his subjects. Similar or equally good reasons may have induced the ministers of this government to have the treaty drawn in its language ; and thus

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considering the treaty in both languages, and each as is declared at its head, "original," the one version neither controls nor is to be preferred to the other; each expresses the meaning of the contracting parties, respectively, in their own language, as in the opinion of each, expressing and declaring the intention of both. If they are mistaken, and the words used do not and are not understood afterwards \* by the parties to convey the same meaning in both [ \* 738 ] languages; then, both being originals and of equal authority, we must resort to some other mode than the inspection of the treaty to give it a proper construction, under the special acts of congress, which require us to decide on the validity of the grants referred to in the 8th article, by the principles and rules of justice and equity, the law of nations, the stipulations of the treaty, the acts of congress, and the laws of Spain, and on such testimony as may be admissible by the rules of evidence and principles of law. Applying then, these tests to the 8th article, and to ascertain its legal meaning when the contracting parties understand it differently, we consider it as, in its effect and legal operation, an exception and reservation of the lands so granted, from the territory ceded to the United States. If the title was confirmed presently, the king had within the bounds of the grant no right or title to convey, and the United States could receive none. If no future act of theirs was necessary to their ratification, and confirmation, the legal estate, much less the beneficial interest, never passed to them. A treaty of cession is a deed of the ceded country, the sovereign is the grantor, the act is his, so far as it relates to the cession, the treaty is his act and deed, and all courts must so consider it, and deeds are construed in equity by the rules of law.

A government is never presumed to grant the same land twice, 7 J. R. 8. Thus a grant, even by act of parliament, which conveys a title good against the king, takes away no right of property from any other; though it contains no saving clause, it passes no other right than that of the public, although the grant is general of the land; 8 Co. 274, b.; 1 Vent. 176; 2 J. R. 263. If land is granted by a State, its legislative power is incompetent to annul the grant and grant the land to another; such law is void, Fletcher *v.* Peck, 6 Cranch, 87, &c. A State cannot impose a tax on land granted with an exemption from taxation, New Jersey *v.* Wilson, 7 Cranch, 164; nor take away a corporate franchise, Dartmouth College *v.* Woodward, 4 Wheat. 518. Public grants convey nothing by implication; they are construed strictly in favor of the king; Dy. 362, a.; Cro. Car. 169. Though such construction must be reasonable, such as will make the true intention of the king as expressed \* in his [ \* 739 ] charter take effect, is for the king's honor, and stands

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with the rules of law; 4 Com. Dig. 428, 554; G. 12; 10 Co. 65. Grants of the strongest kind, *ex speciali gratia, certa scientia, et mero motu*, do not extend beyond the meaning and intent expressed in them, nor, by any strained construction, make any thing pass against the apt and proper, the common and usual signification and intendment of the words of the grant, and passes nothing but what the king owned; 10 Co. 112, b.; 4 Co. 35; Dy. 350, 1 pl. 21. If it grant a thing in the occupation of B, it only passes what B occupied; this in the case of a common person, *& fortiori* in the queen's case, 4 Co. 35 b.; Hob. 171; Hard. 225. Though the grant and reference is general, yet it ought to be applied to a certain particular, as in that case to the charter to Queen Caroline — *id certum est quod certum reddi potest*, 9 Co. 30, a. 46, a. 47, b. S. P. When the king's grant refers in general terms to a certainty, it contains as express mention of it, as if the certainty had been expressed in the same charter; 10 Co. 64 a. A grant by the king does not pass any thing not described or referred to, unless the grant is as fully and entirely as they came to the king, and that *ex certa scientia, &c.*, Dy. 350, b.; 10 Co. 65, a.; 2 Mod. 2; 4 Com. Dig. 546, 548. Where the thing granted is described, nothing else passes, as "those lands;" Hard. 225. The grantee is restrained to the place, and shall have no lands out of it by the generality of the grant referring to it; as of land in A, in the tenure of B., the grant is void if it be not both in the place and tenure referred to. The pronoun "*illa*" refers to both necessarily; it is not satisfied till the sentence is ended, and governs it till the full stop. 2 Co. 33; S. P. 7 Mass. 8, 9; 15 J. R. 447; 6 Cranch, 237; 7 Cranch, 47, 48. The application of this last rule to the words "*de illas*," in the 8th article, will settle the question whether its legal reference is to lands alone, or to "grants" of land. The general words of a king's grant shall never be so construed as to deprive him of a greater amount of revenue than he intended to grant, or to be deemed to be to his or the prejudice of the commonwealth; 1 Co. 112, 13 b. "Judges will invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury which by rigid [ \*740 | rules might be wrought out of the act. Hob. 277. \* The words of a grant are always construed according to the intention of the parties, as manifested in the grant by its terms or by the reasonable and necessary implication, to be deduced from the situation of the parties and of the thing granted, its nature and use; 6 Mass. 334, 5; S. & R. 110; 1 Taunton, 495, 500, 502; 7 Mass. 6; 1 B. & P. 375; 2 J. R. 321, 2; 6 J. R. 5, 10; 11 J. R. 498, 9; 3 E. 15; Cro. Car. 17, 18, 57, 58, 168, 169; Plo. 170, b. 7; E. 621; Cowper, 360, 363; 4 Yeates, 153. These are the fixed rules governing

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private grants, which are construed strongly against the grantor and liberally for the grantee. Yet he shall never take by general words, or by construction, what the grantor had before granted to another. The controlling effect which the situation of the grantor, and the property alleged to be conveyed as evidence of the intention of the grantor, is in law such, that in the case of *Moore v. Magrath*, in 1774, Lord Mansfield declared: "I am very clear it might be plainer with the deed, but without seeing the deed it is plain enough." The words of the deed were sweeping ones: "Together with all his, the said Michael Moore's lands, tenements, and hereditaments in Ireland." Yet it did not pass his paternal estate; the court was unanimous, *Cowper*, 9, 11; the authority of this case is unquestionable. In *Shirras v. Craig*, this court decided, that when there was a piece of property answering to the description in the deed, other property included in the deed, but not intended to be conveyed, did not pass; 7 Cranch, 47, 48. It is useless to pursue the inquiry, whether by the common law the grant of a king can be adjudged to pass what he had conveyed to another, and whose title he intended to ratify and confirm by the very act of a grant to another, by excepting it from the generality or the thing granted, and reserving it from the operation of the new grant for the use of a prior grantee. But it is not deemed useless to show the doctrine of this court as to exceptions and reservations in public and private grants. The insertion of this reservation in this act, (a law of North Carolina,) leads almost necessarily to the opinion that the lands granted to Martin and Wilson, were a part of those to which the act related, and the words of the section show that their title was acquired by this act: "By no course of just reasoning can it be inferred, from these permissions to make appropriations within bounds, not open to entry generally, that a vested right to lands not [ \*741 ] lying within the limits to which the act relates is annulled."

*Rutherford v. Green*, 2 Wheat. 205. In order, therefore, to ascertain what is granted, we must first ascertain what is included in the exception; for whatever is included in the exception is excluded from the grant, according to the maxim laid down in Co. Lit. 47 a. (4 Com. Dig. 289, Fait. E. 6.) *Si quis rem dat, et partem retinet, illa pars quam retinet semper cum eo est et semper fuit*; *Greenleaf v. Birth*, 6 Pet. 302, January, 1832, opinion of this court by Story, J., the other judges concurring unanimously on this point.

It became, then, all-important to ascertain what was granted by what was excepted. The king of Spain was the grantor, the treaty was his deed, the exception was made by him, and its nature and effect depended on his intention, expressed by his words, in reference

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to the thing granted and the thing reserved and excepted in and by the grant. The Spanish version was in his words and expressed his intention, and, though the American version showed the intention of this government to be different, we cannot adopt it as the rule by which to decide what was granted, what excepted, and what reserved; the rules of law are too clear to be mistaken, and too imperative to be disregarded by this court. We must be governed by the clearly expressed and manifest intention of the grantor, and not the grantee in private *& fortiori* in public grants. That we might not be mistaken in the intention or in the true meaning of Spanish words, two dictionaries were consulted, one of them printed in Madrid, and two translations were made of the 8th article, each by competent judges of Spanish, and both agreeing with each other, and the translation of each agreeing with the definition of the dictionaries. "Quedan" in Spanish, correctly translated, means "shall remain"—the verb "quedan" is in French "reste," Latin, "manere," "remaneare," and English, "remain," in the present tense. In the English original, the words are "shall be,"—words in the future. The difference is all-important as to all Spanish grants, if the words of the treaty were, that all the grants of land "shall remain confirmed," then the United States, by accepting the cession, could assert no claim to these lands thus expressly excepted. The proprietors could bring

suits to recover them without any action of congress, and [ \*742 ] any question arising would be purely a judicial one.

"Shall be ratified," makes it necessary that there should be a law ratifying them or authorizing a suit to be brought, otherwise the question would be a political one, not cognizable by this court, as was decided in *Foster and Elam v. Neilson*, 2 Pet. 254.

But aside from this consideration, we find the words used in the Spanish sense as to the grants made after the 24th of January, 1818, which are, by the same article in English, "hereby declared and agreed to be null and void." The ratification is in Spanish and English. The Spanish words in the Spanish version are "quedado" and "que lan," in reference to the annulled grants; the English are, "have remained," "do remain." The principles of justice and the rules of both law and equity are too obvious not to require that, in deciding on the effect and legal operation of this article of the treaty, by the declared and manifested intention of the king, the meaning of Spanish words should be the same in confirming as in annulling grants—a regard to the honor and justice of a great republic, alike forbid the imputation of a desire that its legislation should be so construed and its law so administered, that the same word should refer to the future as to confirming, and to the present in annulling grants, in the same article of the same treaty.

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For these reasons, and in this conviction, we consider that the grants were confirmed and annulled respectively — simultaneously with the ratification and confirmation of the treaty; and that, when the territory was ceded, the United States had no right in any of the lands embraced in the confirmed grants.

As this point was urged at length by counsel on both sides, it was due to them that the court should consider it fully, and express their opinion upon it clearly; argued as this case has been, upon grounds deemed by both sides vital to its merits, we could not exclude them upon our consideration. But there are other grounds which, though not adverted to by counsel, would, in our view, have led to the same result. It is wholly immaterial to the decision of this case, whether the 8th article of the treaty is construed to be an actual present confirmation and ratification of the grants by both governments, or a stipulation of it for the future; for the laws of 1824 and 1828 require us to decide on the validity of the title of the claimants under those grants according to the stipulation [ \*743 ] of any treaty. Our decree is final, and, if in favor of the claimants, is conclusive against the title of the United States. Under these laws, the effect of the stipulation to ratify and confirm the grants is a judicial question, referred to us as such by congress; in deciding upon it by the rules prescribed, we assume no authority, we but obey the laws, as in duty bound, by decreeing according to our most deliberate and settled judgment. Should we be called on to decide on the validity of a title acquired by any Spanish grant not embraced by these laws, we should feel bound to follow the course pursued in *Foster against Neilson*, in relation to the stipulation in the 8th article of the Florida treaty, "that the legislature must execute the contract before it can become a rule for this court." 2 Pet. 314. We are thus explicit to avoid possible misapprehension.

We are also of opinion that the legal construction of the 8th article in English would lead to the same conclusion at which we have arrived, according to the view heretofore taken of the Spanish. The law deems every man to be in the legal seisin and possession of land to which he has a perfect and complete title; this seisin and possession is coextensive with his right, and continues till he is ousted thereof by an actual adverse possession. This is a settled principle of the common law, recognized and adopted by this court in *Green v. Litter*, 8 Cranch, 229, 230; *Barr v. Gratz*, 4 Wheat. 213, 233; *Propagation Society v. Pawlett*, 4 Pet. 480, 504, 506; *Clarke v. Courtney*, 5 Pet. 354, 355. And is not now to be questioned.

This gives to the words, "in possession of the lands," their well settled and fixed meaning; possession does not imply occupation or

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residence; had it been so intended, we must presume they would have been used. By adopting words of a known legal import, the grantors must be presumed to have used them in that sense, and to have so intended them; to depart from this rule would be to overturn established principles.

To adopt the literal English version, and reject its meaning, as settled at common law and by this court, would make this article confine the confirmation of grants of land to cases of actual occupation and residence. This would be to give to the \*treaty [ \*744 ] a construction more limited than the acts of congress have done to place Spanish grants on a worse footing under the Florida, than they were under the Louisiana treaty, or the compact with Georgia, and to exclude from our consideration many of the same classes of cases on which special tribunals, in their proceedings under the stipulations of the treaty, had decided and confirmed similar grants. We are satisfied that, by adopting and acting on this version, so taken literally, we should violate the intention and spirit of the laws which give us jurisdiction, and are the guides to its exercise; we cannot decide according to the principles of justice in any other way than by considering the words according to their legal acceptation too often given by this court not to be respected by it. By grants of land we do not mean the mere grant itself, but the right, title, legal possession and estate, property and ownership; legally resulting upon a grant of land to the owner. There is one other expression in the 2d clause of the 8th article, which we deem it our duty to notice. In the English version it is, "but the owners in possession of such land," &c.; there is no sentence in the Spanish version which can correspond with this, the word "*proprietarios*" means owners, but not "owners in possession of such land." The intention of the Spanish grantor is too apparent to be mistaken by any tribunal authorized to decide judicially on the true construction of a contract according to the meaning and intention of the contracting parties. This furnishes another powerful reason in favor of the construction we have given to the English phrase, by which their legal intendment and effect are the same.

This part of the 8th article was for the benefit of those persons who were purchasers under the faith of a public grant, evidently intended to be protected and secured in their rights by the stipulation of a treaty which ought to be construed liberally by a tribunal authorized and required to decide on the validity of these grants by the principles of justice and according to the rules of equity having a due regard to this article of the treaty. We cannot better regard it than by carrying into effect these principles and rules, by such an

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exposition of it as we are convinced meets the intention of the parties, and effectuates the object intended to be accomplished.

\* We now consider the conditions on which the grants [ \* 745 ] were made. According to the rules and the law by which we are directed to decide this case, there can be no doubt that they are subsequent; the grant is in full property in fee, an interest vested on its execution which could only be devested by the breach or non-performance of the conditions, which were, that the grantees should establish on the lands two hundred Spanish families, together with the requisites pointed out, and which shall be pointed out by the superintendency, and begin the establishment within three years from the date of the grant. No time was fixed for the completion of the establishment, and no new requisites or conditions appear to have been imposed. From the evidence returned with the record, we are abundantly satisfied that the establishment was commenced within the time required, (which appears to have been extended for one year beyond that limited by the grant,) and in a manner which, considering the situation of that country as appears by the evidence, we must consider as a performance with that part of the condition. Great allowance must be made not only from the distracted state and prevalent confusion in the province at the time of the grant, but until the time of its occupation by the United States. Though a court of law must decide according to the legal construction of the condition, and call on the party for a strict performance, yet a court of equity, acting on more liberal principles, will soften the rigor of law, and though the party cannot show a legal compliance with the condition, if he can do it *cy pres*, they will protect and save him from a forfeiture. 4 Dall. 203; 2 Fonb. 217, 218, 220; 1 Vern. 224, 225; 2 Vern. 267, and note.

The condition of settling two hundred families on the land has not been complied with in fact; the question is, has it been complied with in law, or has such matter been presented to the court as dispenses with the performance and devests the grant of that condition.

It is an acknowledged rule of law that if a grant is made on a condition subsequent, and its performance becomes impossible by the act of the grantor, the grant becomes single. We are not prepared to say that the condition of settling two hundred Spanish families in an American territory has been, or is \*possible; [ \* 746 ] the condition was not unreasonable or unjust at the time it was imposed; its performance would probably have been deemed a very fair and adequate consideration for the grant, had Florida remained a Spanish province. But to exact its performance after its cession to the United States, would be demanding the *summum jus*

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indeed, and enforcing a forfeiture on principles which if not forbidden by the common law, would be utterly inconsistent with its spirit. If the case required it, we might feel ourselves at all events, justified, if not compelled to declare, that the performance of this condition had become impossible by the act of the grantors; the transfer of the territory, the change of government, manners, habits, customs, laws, religion, and all the social and political relations of society and of life. The United States have not submitted this case to her highest court of equity; on such grounds as these, we are not either authorized or required by the law, which has devolved upon us the final consideration of this case, to be guided by such rules or governed by such principles in deciding on the validity of the claimant's title. Though we should even doubt, if sitting as a court of common law, and bound to adjudicate this claim by its rigid rules, the case has not been so submitted. The proceeding is in equity, according to its established rules; our decree must be in conformity with the principles of justice, which would in such a case as this, not only forbid a decree of forfeiture, but impel us to give a final decree in favor of the title conferred by the grant.

It has been objected to the validity of the grant that it exceeds the quantity authorized by the laws of the province. The view we have taken of the royal order dated in September, 1817, preceding the grant, and by the authority of which it purports to have been made, renders it unnecessary to say more in relation to this objection than that the disposition of the royal domain in Florida was within the jurisdiction of the intendant, Ramirez. That he had power to make the grant, the terms and extent of which were within his discretion, of the proper exercise of which this court has neither the power or right to judge. We will, however, observe that we are well satisfied

[ \* 747 ] that the local authority was competent to make grants of lands of a greater quantity than that to which the \* counsel of the United States have contended that they were limited; the United States have never insisted on limiting grants to such a pittance. Their uniform legislation and the proceedings of all the tribunals who have acted under their authority during all the time which has elapsed since their acquisition of any territory within which Spanish grants have been issued, show that they have never been disposed to confine them so narrowly, but the contrary. This case does not require us to define their extent.

The question of fraud has been pressed in the argument, but we perceive nothing in the evidence which shows its existence so as to bring it home to the claimants, or that it exists at all according to the definition and rules heretofore settled.

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It is objected that the lands in question are within the Indian boundary, and not subject to be granted. Of the fact of such location there seems to be no doubt, as the centre of the grant is the Indian town of Alachua. The title of the Indians to these lands is not a matter before us; the grant is made subject to their rights if they return to resume them, and their abandonment has been ascertained by a proceeding which the intendant in the grant calls a sentence pronounced by him in his official character, on the report of the attorney and surveyor-general. This seems to be a mode of proceeding known to the Spanish law in force in the province, in the nature of an inquest of office, as a judicial act, which vitally affecting the royal domain, come within its general superintendency, under the royal order of September. It was conducted, so far as we can perceive, by the proper officers; the law officer of the crown to report on the laws affecting the subject, and the surveyor-general as to the fact; so that, on their joint report, the superior officer could decree officially, whether, from the nature of the Indian right of occupancy, it had in law and by the actual condition of the land, in fact, reverted to and become reannexed to the royal domain by the abandonment of the occupancy. The intendant pronounced his sentence on the report of these officers, and declared the granted lands to be a part of the royal domain, and open to a grant, reserving the Indian right of occupancy whenever it should be resumed. The fact of abandonment was the important one to be ascertained; if voluntary, the dominion of \*the crown over it [ \* 748 ] was unimpaired in its plenitude; if by force, the Indians had the right, whenever they had the power or inclination, to return.

This is a matter which we feel bound to consider a judicial one, and that we cannot look behind the final sentence of an authorized tribunal to examine into the evidence on which it was founded; but must take it as a *res adjudicata* by a foreign tribunal, judicially known, and to be respected as such. Similar proceedings are directed by the various acts of congress; the land commissioners, or officers of the land-offices, as the case may be, confirm or reject claims, and the land embraced in the rejected claims, reverts to the public fund. So it is provided by the 7th section of the act of 1824, as to claims barred by not being duly presented or prosecuted, or which shall be decreed against finally by this court: There is another answer to this objection, which deserves notice. Grants of land within the Indian boundary, are not excepted in the laws referring them to judicial decision; congress made what exceptions they thought proper; as the law has not done it, we do not feel authorized to make an exception of this.

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It is lastly objected, that the extension of time by the intendant in December, 1820, was without authority, being subsequent to the ratification of the treaty by the king of Spain. But the ratification by the United States was in February following, and the treaty did not take effect till its ratification by both parties operated like the delivery of a deed to make it the binding act of both. That it may and does relate to its date as between the two governments, so far as respects the rights of either under it, may be undoubted; but as respects individual rights, in any way affected by it, a very different rule ought to prevail. To exact the performance of the condition of settlement of two hundred Spanish families, or any great progress in its commencement, after the date of the treaty and during the confused and uncertain state of things preceding its ratification, would be both unreasonable and unjust; and if the question was new in this court, we should have no hesitation in saying, that, as to the grants of land subject to the condition of settlements, the ratification of the treaty must be taken at its date. But the question is not a new one. In 1792, the State of Pennsylvania passed [ \*749 ] a law for the sale of her vacant \*lands; the warrants issued under it contained a condition of improvement and settlement, within two years from their date, unless prevented by force of arms of the enemies of the United States, from making and continuing such settlement. The treaty of Greenville<sup>1</sup> was made in August, 1794, but not ratified till December, 1795. The uniform decisions of the supreme court of Pennsylvania, and the solemn decision of this court in Huidekoper's Lessee against Douglass, have settled the date of the treaty to be its ratification, so far as it bears on or in any way affects the rights of parties under the land-laws of Pennsylvania. The obligation to settle did not begin till the expiration of two years thereafter, and if commenced in the course of the following spring, the condition has been considered as complied with. 3 Cranch, 1, 65; 4 Dall. 199.

Being, therefore, of opinion that the title of the claimants is valid, according to the stipulations of the treaty of 1819, the laws of nations, of the United States, and of Spain, the judgment of the court below is affirmed.

THOMPSON, J., dissenting.

Not concurring in the conclusion to which the court has come in this case, and considering the magnitude of the property involved, not only in this case, but in the application of the principles which govern the decision to other cases, and that the construction now given to the treaty is confessedly at variance with that which has

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been heretofore adopted, I shall briefly assign my reasons for dissenting from the opinion of the court. It is not my purpose to enter into an examination of all the questions which have been discussed at the bar. The view which I have taken of the case does not make it necessary for me to do so.

The grant under which the petitioners in the court below set up their claim, bears date on the 22d of December, 1817, and is for a tract of land in East Florida, a little short of 300,000 acres. It was made by Don Alexander Ramirez, intendant of the Island of Cuba, and superintendent of the two Floridas. It recites that the memorial for the same was presented to the intendancy on the 15th of November, then last past, praying a gratuitous \*concession [ \* 750 ] of the land, and offering to make an establishment in the territory, known by the name of Alachua, composed of 200 families. The grant is thereupon gratuitously made, as therein expressed, in full property, and with the precise obligation to establish there 200 families, which must be Spanish, the establishment beginning within the term of three years, at most; without which the grant shall be considered null and void.

The validity of this claim depends on the construction of the 8th article of the treaty between the United States and the King of Spain, bearing date the 22d of February, 1819. It is contended on the part of the appellees, that, under the true construction of this treaty, the only questions open for inquiry are, 1st, whether the grant is genuine; and, 2dly, whether made by lawful authority. That, upon the establishment of these points, the treaty, *ipso facto*, confirms the grant, and closes the door to all further inquiry—the date of the grant being antecedent to that of the treaty. It is admitted that this is a different interpretation of the treaty from that which has heretofore prevailed in our own government, and the change of construction is rested upon an interpretation of the Spanish language, as used in the treaty, rejecting the English side of that instrument. The treaty, when signed, was in both languages; and each must be considered as the original language, and neither as a translation. It cannot be said that the English is an erroneous translation of the Spanish, any more than that the Spanish is an erroneous translation of the English. The English side of the 8th article of the treaty reads thus: "All the grants of land made before the 24th of January, 1818, by his Catholic majesty, or by his lawful authorities, in the said territories ceded by his Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent, that the same grants would be valid if the territories had remained under the dominion of his Catholic majesty. But the own-

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ers in possession of such lands, who, by reason of the recent circumstances of the Spanish nation, and the revolutions in Europe, have been prevented from fulfilling all the conditions of their grants, shall complete them within the terms limited in the same, respectively, from the date of the treaty; in default of which the said grants shall be null and void. All grants made since the 24th of January, 1818, when [ \* 751 ] the first proposal on the part of his Catholic majesty for the cession of the Floridas was made, are hereby declared to be null and void."

The material parts in which the English and Spanish are said not to agree are, 1st, where the English declares that the grants "shall be ratified and confirmed," the Spanish is, "shall remain ratified and confirmed;" and, 2dly, where the English is, "shall be ratified and confirmed to the persons in possession of the land," the Spanish construction is, "to the persons in possession of the grants;" and, 3dly, in that part of the article which extends the time for fulfilling the conditions, which, according to the English, is, to the owners in possession of the "land," the Spanish construction is, "the owners in possession of the grants." It will readily be perceived that the different readings lead to very different results, and which materially affect the grant in question. If titles are confirmed only to persons in possession of the land at the date of the treaty, the grant in question does not come within the saving; for there is no pretence that Arredondo, or any person claiming under him, was, at the date of the treaty, in possession of the land; or had done any thing towards fulfilling the conditions upon which the grant was made to depend, and without which it is declared to be null and void. If the construction of the Spanish side of the treaty, as now contended, is to be adopted, and all grants before the 24th of January, 1818, are confirmed by the treaty, *proprio vigore*,—the declaration that they shall be confirmed to the same extent that the same grants would be valid, if the territories had remained under the dominion of his Catholic majesty, are entirely nugatory, and must be rejected, for we have no right to enter into the inquiry, how far they would be valid under the Spanish government. Such was most manifestly not the intention of the contracting parties; but that the United States should be substituted in the place of Spain, and should carry into execution in good faith the contracts made under the Spanish government for the disposition of the lands, and which the Spanish government was bound *ex debito justitiae* to carry into execution. The treaty must be considered as made in reference to an established system relative to the disposition of the land in the territories ceded; and that all [ \* 752 ] grants would be open to examination, \*whether valid or

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not, according to the rules and regulations established by such system. It seems to be admitted that, if the English side of the treaty is to govern, the grant in question would not come within the saving of the 8th article, unless the date of the treaty is to be considered as of the time it was finally ratified on the 19th of February, 1821. Before which time, it is contended, the establishment was commenced according to the conditions of the grant. This question will be noticed hereafter.

I do not profess to understand the Spanish language, and shall, therefore, not undertake to say whether the criticisms are well founded or not. But it must strike any one as a little extraordinary, not only that the negotiators of the treaty should have sanctioned such a material discrepancy, but that congress should have been legislating for ten years past upon the English side of the treaty, different boards of commissioners sitting and trying the titles under such constructions, and that this court should have fallen into the same error, and the mistake not discovered till now.

But admitting this discrepancy, as now contended for, exists between the English and Spanish side of the treaty, the question arises, which must we adopt? I know of no rule that requires a court of justice to reject the English, and adopt the Spanish. If congress, in their liberality, should think proper to do this, the power could not be disputed, and so far as it extended to the protection of actual *bona fide* settlers upon the land, the power, in my judgment, would be wisely and discreetly exercised. But it does not seem to me that a court of justice can be called upon, as a matter of courtesy, to yield this to a foreign power, in the construction of a treaty; and no rules of law applicable to the construction of contracts, will, in my judgment, justify it. It certainly will not be pretended that the royal rule of construction applies to this case. That where a grant is made by the king, it is to be taken most beneficially for the king and against the grantee. It is, I think, not claiming too much to consider it a contract between equals, and the rule would be more applicable, which requires, in such case, that the grant should be construed most strongly against the grantor.

It is certainly true, as a general rule, that all written instruments are to be construed by themselves, without resorting \* to evidence *dehors* the instrument, to ascertain the intention of the parties, except where there is a latent ambiguity, which is not the case here. But that principle cannot, with propriety, be applied to the present case; the difficulty does not arise from any obscurity, either in the English or in the Spanish side of the treaty, if considered separately, but from a discrepancy, when compared

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together; and, in my judgment, presents a proper case for an inquiry into the intention and understanding of the parties who negotiated the treaties.

"Every treaty," says Vattel, "must be interpreted as the parties understood it when the act was proposed and accepted." The lawful interpretation of the contract ought to tend only to the discovery of the thoughts of the author or authors of the contract; as soon as we meet with any obscurity, we should seek for what was probably in the thoughts of those who drew it up, and interpret it accordingly. This is the general rule of all interpretation. That all miserable subtleties and quibbles about words are overthrown by this unerring rule. Vattel, see 262, pp. 228, 230.

Such understanding, in the present case, is to be collected from written evidence which will speak for itself, and not from parol declarations, which might be misunderstood or misrecalled; and if we resort to such written evidence, no doubt, it appears to me, can remain on the construction of the treaty, that it was not the understanding, either of Mr. Adams or Don Onis, that all grants of land made before the 24th of January, 1818, by his catholic majesty or his lawful authorities, should be confirmed by the mere force and operation of the treaty.

It is said the treaty does not purport to transfer private property; that all such property is excepted under the 2d article. This proposition cannot be true in the broad extent to which it has been laid down. It may not transfer private property, but it annuls private property, if every grant, of whatever description, is to be considered private property. For upon this construction, there would be a direct repugnancy between the 2d and 8th articles; the latter declares that all grants made since the 24th of January, 1818, shall be null and void. But the king of Spain did not consider a mere gratuitous grant, upon conditions which had

in no manner whatever been fulfilled, as private property.

[ \* 754 ] This must have \*been the ground upon which he annulled the grants to Alagon, Punon Rostro, and Vargas. So it was understood by Don Onis, as will be shown hereafter by his correspondence. And the same power was assumed over like grants in other cases, where no private right became vested by taking possession, or doing some act towards fulfilling the condition of the grants; and where that has been done, the right is secured to the person in possession, according to the provisions of the 8th article. But let us look at the correspondence between Mr. Adams and Don Onis, which lead to this 8th article.

The material point of difference between the negotiators in framing this article was, whether it should absolutely confirm all grants made

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prior to the 24th of January, 1818, or only *sub modo*, so as to enure to the benefit of actual *bona fide* settlers on the land at the time the treaty was made; and the article resulted in the form in which it now stands.

The article states that the proposition to cede the territory originated, on the part of Spain, on the 24th of January, 1818, or that is assumed as the date, though doubtless there must have been some previous communications on the subject, either here or by our minister to Spain; for Mr. Erving, by his letter of the 10th of February, 1818, wrote to Mr. Adams, that the king of Spain had lately made large grants of land in East Florida to several of his favorites; and that he had been credibly informed, that, by a sweeping grant to the duke of Alagon, he had within a few days past given away the remainder. 1 State Papers, 13.

Our government was therefore apprised of what was probably going on with respect to grants in Florida, and must be presumed to have intended to guard against them. On the 24th of October, 1818, Don Onis sent to Mr. Adams a proposition to cede the Floridas, with the following clause: "The donations or sales of lands made by the government of his Majesty, or by legal authorities until this time, are, nevertheless, to be recognized as valid." On the 31st of October, Mr. Adams answered, declining his proposal, and requiring all the grants lately alleged to have been made by Spain should be cancelled, and proposed to carry back the time to all grants made after the year 1802. This Don Onis declined, but offered to annul all grants made after the 24th January, 1818, saying, that the \* grants had been made with a view to promote population, [ \* 755 ] cultivation, and industry, and not with that of alienating them; and that they should be declared null and void in consideration of the grantees not having complied with the essential conditions of the cession. 1 State Papers, 25, 26.

Again, on the 9th of February, 1819, Don Onis, in his project of a treaty sent to Mr. Adams, reiterates the same provision, that all grants shall be confirmed and acknowledged as valid except those which had been issued after the 24th of January, 1818, which should be null in consideration that the grantees had not complied with the conditions of the cessions. 1 State Papers, 87.

In all this correspondence, we find Don Onis persisting in his claim, that all grants, prior to the 24th of January, 1818, should be absolutely confirmed; and assigning as the reason why those issued subsequent to that date should be annulled, because the grantees had not complied with the conditions; and we find Mr. Adams continually rejecting the proposition to consider the grants before that period ab-

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solutely confirmed ; and yet it is now insisted that all such are confirmed by the treaty. The subsequent negotiation shows that the article, as it now stands, was put into that shape expressly for the purpose of guarding against such construction, and with the understanding, both of Don Onis and Mr. Neuville, who acted in his behalf during a part of the negotiation, that the grants of land dated before as well as after the 24th of January, 1818, were annulled, except those upon which settlements had been commenced, the completion of which had been prevented by the circumstances of Spain and the recent revolutions in Europe. It is unnecessary for me to state more particularly this correspondence ; the result, as above stated, will be found fully supported by a reference to the correspondence in the 1st volume of State Papers, pp. 13, 25, 26, 34, 46, 68, 74, 75. There can be no doubt that such was the understanding of Don Onis and Mr. De Neuville ; and Mr. Adams, in a letter to our minister in Spain, whilst the treaty was pending before the king for ratification, states that the reasons why the grants to the duke of Alagon and others were not excluded by name, were : 1. Conformably to the desire of Mr. Onis to save the honor of the king ; and, 2. Because, from the dispatches of Mr. Erving, it was supposed there [ \* 756 ] were other grants of the same kind, and \* made under similar circumstances. To have named them might have left room for a presumptive inference in favor of others ; the termination was to exclude them all.

That the grant to Arredondo was made under similar circumstances, and liable to the same objections with those to Alagon, Punon Rostro and Vargas, is most manifest. Applications for them all were made within a few months of each other, in the latter part of the year 1817 and beginning of 1818, and no settlements made on either at the date of the treaty ; and to consider the treaty as precluding all inquiry into the validity of this grant, appears to me directly in the face of the very words of the treaty, and most manifestly against the clear understanding of those by whom it was made ; and such is the construction given to this article by this court in the case of Foster and Elam *v.* Neilson, 2 Pet. 314.

The court say the words of the article are, " that all the grants of land made before the 24th of January, 1818, by his catholic majesty, &c., shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his catholic majesty." Do these words act directly on the grants, so as to give validity to those not otherwise valid, or do they pledge the faith of the United States to pass acts which shall ratify and confirm them ? That ar

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ticle does not declare that all the grants made by his catholic majesty before the 24th of January, 1818, shall be valid to the same extent as if the ceded territories had remained under his dominion ; and yet this is the very construction sought to be given to it in the present case. It does not say that those grants are hereby confirmed. Had such been its language, it would have acted directly on the subject, and would have repealed those acts of congress which were repugnant to it. But its language is, that those grants shall be ratified and confirmed to the persons in possession, &c. By whom shall they be ratified and confirmed ? This seems to be the language of contract ; and if it is, the ratification and confirmation which are promised, must be the act of the legislature.

Until such act shall be passed, the court is not at liberty to disregard the existing laws on the subject. Congress appears to have understood this article as it is understood by the court.

\* Boards of commissioners have been appointed for East [ \* 757 ] and West Florida, to receive claims for lands, and on their reports titles to lands, not exceeding      acres, have been confirmed to a very large amount.

By the act of the 8th of May, 1822, 7th vol. Laws U. S. 104, §§ 4 and 5, concerning claims and titles to land within the territory of Florida, persons claiming title under any patent, grant, concession, or order of survey, dated previous to the 24th day of January, 1818, which were valid under the Spanish government, or by the law of nations, and which are not rejected by the treaty ceding the territory, are required to file such claim with the commissioners ; and power is given to the commissioners to inquire into the justice and validity of such claims. No patent or grant is exempt from such inquiry : and if they are absolutely confirmed by the treaty, how could the justice and validity of them be subject to the examination of the commissioners ? And the same principle runs through all the laws in relation to these claims. See acts of 1828, p. 60, 7 Laws U. S. 300.<sup>1</sup>

It appears to me, therefore, that the plain letter of the 8th article of the treaty, the clear and manifest intention of the negotiation, the uniform understanding of congress, and the opinion of this court, all concur in the construction that grants made prior to the 24th of January, 1818, are required to be ratified and confirmed to persons in the actual possession of the lands at the date of the treaty, and to be held valid to the same extent only that they would have been binding on the king of Spain ; giving to *bond fide* grantees in such actual possession, and having commenced settlements, but who had been

<sup>1</sup> 4 Stats. at Large, 284.

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prevented by the late circumstances of the Spanish nation and the revolutions in Europe from fulfilling all the conditions of their grants, time to complete them.

If, by the true construction of the treaty, the party claiming the benefit of this article must show an actual possession of the land at the date of the treaty, it becomes necessary to inquire what that date is. It was concluded and signed on the 22d of February, 1819, ratified by the king of Spain on the 24th of October, 1820, and by the United States on the 19th of February, 1821; and the question is, which of these periods is to be taken as the [ \* 758 ] date of the treaty? I think the time the treaty was concluded and signed, must be taken as the date. The contracting parties had in view the state and condition of things at that time, and neither could in good faith change such condition so as to affect any stipulations in the treaty. Any other construction would open the door to fraud and imposition. Suppose the 8th article, instead of the 24th of January, 1818, had said, all grants of land made before the date of the treaty shall be valid; would that have made valid grants issued after the treaty was signed, and before ratified by the United States? No one, it is believed, would contend for this; and if for any purpose the date as fixed by the instrument would govern, it ought in all cases. The rule should be uniform, and not open to be changed for the purpose of meeting particular cases. The date as fixed in the instrument is the only certain period; the time of ratification is altogether uncertain. Changes may take place between the two periods, materially affecting the negotiation, and the ratification may be delayed for the express purpose of accomplishing some such object.

The true rule on this subject is laid down by Mr. Justice Washington, in the case of *Hylton v. Brown*, 1 Wash. C. C. R. 312, that the treaty, when ratified, relates back to the time of signing. The ratification is nothing more than evidence of the authority under which the minister acted. A government is bound to perform and observe a treaty made by its minister, unless it can be made to appear that he has exceeded his authority. But a ratification is an acknowledgment that he was authorized to make the treaty; and if so, the nation is bound from the time the treaty is made and signed; and it is worthy of notice that, in all the acts of congress in relation to this treaty, it is referred to as of the date of 22d February, 1819, the time it was signed; thereby showing the understanding of our own government on the subject. If this then is to be taken as the date of the treaty, there is no pretence that at that time, or even when ratified by the king of Spain, any settlement had been made or possession

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taken of any part of this tract. It is, therefore, in my opinion, a case not coming within the saving provision in the 8th article of the treaty.

But if the time of ratification is assumed as the date of the treaty, no possession of the land had then been taken, within any reasonable construction of the treaty. William H. Hall testifies that \* he, with two men, by the name of Smith and Lanman, [ \* 759 ] went to Alachua, on the 7th of November, 1820, and began to clear some land and erect some buildings. That he soon after went to St Augustine, where he was taken sick and remained some time. That on returning to Alachua, he found some persons there, employed by Mitchell and Arredondo, who were personally disagreeable to him, and he abandoned the project and settlement, (record 189,) and what became of the others does not appear—they must have abandoned also; for, William H. Simmons testifies, (record 174, 176,) that he was at Alachua in February, 1822; saw five or six houses; Wanton was there, and he understood had been upwards of a year. That on his first visit, there was no other person established there but Mr. Wanton, and some negroes. So that in February, 1822, one year after the ratification of the treaty by the United States, one white man and a few negroes, who, the witness understood, had been there upwards of a year, were the only persons on the land; and this is claimed to be a possession of nearly 300,000 acres of land, within the meaning of a solemn treaty. This view of the case renders it unnecessary for me to enter upon the inquiry respecting the authority of the intendant, Ramirez, to make the grant in question, or whether the conditions contained in it have been performed, or in any way dispensed with or discharged.

Upon the whole, I am of opinion that the judgment of the court ought to be reversed.

This cause came on to be heard on the transcript of the record from the superior court for the eastern district of Florida, and was argued by counsel. On consideration whereof, this court is of opinion that there is no error in so much of the said decree as determines that the claim is valid and ought to be confirmed; and this court doth affirm so much thereof, and doth decree that the title of the claimants is valid according to the stipulations of the treaty between the United States and Spain, dated the 22d day of February, Anno Domini 1819, the laws of the United States in relation thereto, the laws of nations, and of Spain. And this court, \* proceeding [ \* 760 ] to render such decree as the said superior court ought to have done, doth finally order, determine, and decree, that so much of

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Gassies v. Ballon. 6 P.

said decree as directs the land embraced in the grant of Don Alejandro Ramirez, the intendant of Cuba, to Don Fernando de la Maza Arredondo y Hijo, dated the 22d day of December, Anno Domini 1817, to be laid off "in a square tract, containing 289,645 and five sevenths acres of English measurement, the centre thereof being the known spot, monument, or marked tree, at or near the house at present the dwelling of Edward M. Wanton; said spot, monument, or marked tree, to be ascertained by the surveyor, who under the law shall survey the said tract," be and the same is hereby reversed and annulled. And this court doth further and finally order, adjudge, and decree, that the said land be laid off in a square form, containing 289,645 and five sevenths acres, English measure, the centre whereof to be a place known as Alachua, inhabited in other times by a tribe of Seminole Indians. And the centre of said place, known as Alachua, to be considered as the centre of the grant.

9 P. 117, 224, 711; 10 P. 303, 318, 449, 662; 11 P. 41, 102, 420; 12 P. 178, 410, 476, 511, 667; 18 P. 486; 14 P. 384, 363, 599, 614; 15 P. 215; 16 P. 71, 158, 228; 2 H. 319; 7 H. 1, 888; 8 H. 817; 9 H. 421, 451; 18 H. 250; 16 H. 268; 17 H. 542; 19 H. 866; 20 H. 59; 21 H. 445; 22 H. 448; 24 H. 508; 2 B. 17; 9 W. 34; 11 W. 689, 640; 18 W. 467; 7 O. 216; 11 O. 509.

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PIERRE GASSIES, Plaintiff in Error, v. JEAN GASSIES BALLON,  
Defendant in Error.

6 P. 761.

An averment that the defendant is a naturalized citizen of the United States, and resides in Louisiana, and the plaintiff is a citizen of France, is sufficient to give jurisdiction to a circuit court.

ERROR to the district court of the United States for the eastern district of Louisiana, by an alien, a citizen of France.

The defendant was described on the record as "now residing in the parish of West Baton Rouge, where the said Pierre Gassies caused himself to be naturalized an American citizen."

The defendant prosecuted this writ of error.

Taney, (attorney-general,) for the plaintiff in error.

Key, for the defendant.

[ \*762 ] \* MARSHALL, C. J., delivered the opinion of the court.

In this case, the court is of opinion that the jurisdiction can be sustained. The defendant in error is alleged in the proceedings to be a citizen of the United States, naturalized in Louisiana, and residing there. This is equivalent to an averment that he is a citizen of that State. A citizen of the United States, residing in any State of the Union, is a citizen of that State.

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Strother v. Lucas. 6 P.

The authorities on this question have gone far enough; and this court is not disposed to narrow any more the limitations which have been imposed by the decided cases. They have gone as far as it would be reasonable and proper to go. The judgment of the district court of Louisiana is affirmed.

9 P. 156; 16 H. 314; 19 H. 893; 9 W. 565.

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DANIEL F. STROTHER, Plaintiff in Error, v. JOHN B. C. LUCAS,  
Defendant in Error.

6 P. 763.

Under the acts of March 2, 1805, (2 Stats. at Large, 324,) and March 3, 1807, (2 Stats. at Large, 440,) relative to land titles in Louisiana, a confirmation by commissioners does not necessarily enure to the benefit of the holder of the true French or Spanish title. And where the French owner twice conveyed, and possession went with the junior title, and its holder presented his claim, and it was confirmed, and the holder of the elder title wholly omitted to do any act under the laws of congress, it was held that he was entitled to no benefit therefrom.

Though, where it is not possible from lapse of time to offer evidence of handwriting, by a witness who had seen the party write, a comparison of handwriting of the document to be proved with other writings known to be his, may be heard, yet generally it is not to be allowed.

THE case is stated in the opinion of the court.

*Renton and Taney*, (attorney-general,) for the plaintiff.

*Wirt*, contra.

\* THOMPSON, J., delivered the opinion of the court. [ \* 767 ]

This case comes up on a writ of error from the district court of Missouri. It was an action of ejectment for two arpens of land in front and forty arpens in depth, in and adjoining the city of St. Louis, in the State of Missouri.

The material question in the case arises upon an instruction given to the jury upon the prayer of the defendant below, who is the defendant here.

Upon the trial, no evidence was given on the part of the defendant, and the plaintiff having closed his case, the defendant moved the court to instruct the jury as follows: "That if the jury find from the evidence that the two confirmations made by the board of commissioners to Auguste Choteau, given in evidence by the plaintiff in this case, are for the same land, and include all the premises in the declaration mentioned, the plaintiff cannot recover in this action." Which instruction was given, and the jury found a verdict for the defendant.

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Strother v. Lucas. 6 P.

In the course of the trial certain depositions were offered in evidence, which, among other things, went to prove the handwriting of Rene Kiercereau, whose name appeared as a witness to one of the deeds which had been admitted in evidence, (and who, in the body of the deed, was described as a witness of assistance,) by comparing the handwriting of the witness with the handwriting of entries made in a certain register of marriages and interments, alleged to have been made by the witness; of which, however, there was no direct evidence. The depositions, so far as they went to prove the handwriting of the witness to the deed by comparison, were objected to and overruled by the court, to which exception was taken.

It is a general rule that evidence by comparison of hands is not admissible, where the witness has had no previous knowledge of the handwriting, but is called upon to testify merely from a comparison of hands. There may be cases, where, from the antiquity of the writing, it is impossible for any living witness to swear that he ever saw the party write, comparison of handwriting with documents, known to be in his handwriting, has been admitted. But these are extraordinary instances, arising from the necessity of the case, and which do not apply to the one before the court. For there were living witnesses examined as to the handwriting, and, besides, the [ \* 768 ] \* deed was received and read in evidence, and the plaintiff had the full benefit of it. But it is said the evidence was offered for the purpose of identifying the witness, and to show that he was the original grantee of the forty arpens, and the husband of Marie Reneux Robillar; and being named in the deed as a witness of assistance, it operated by the Spanish and French law as a conveyance of his own title, the same as if he had signed the deed as grantor.

There are two answers to be given to the objection made to the ruling of the judge in the court below, in the view now presented. In the first place, that was not stated as the purpose for which it was offered, nor was it shown that such was the operation of the deed thus witnessed by the Spanish or French law; and these being foreign laws should have been proved. The court cannot be charged with knowledge of foreign laws. But in the second place, the record does not show that the judge was called upon to express any opinion with respect to the legal effect and operation of the deed, or that the plaintiff had not the full benefit of its being considered his deed. And, indeed, it would seem from the course of the trial, that it was so considered, or at all events the contrary does not appear from any question presented to the court on the subject.

Two other points have been made and argued here, which do not

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Struther v. Lucas. 6 P.

appear to have been raised in the court below, and which will be very briefly noticed.

It is objected on the part of the defendant that the plaintiff's claim, even from his own showing, is no more than an equitable right, for which an action of ejectment will not lie.

There is in the State of Missouri an act of the legislature regulating the action of ejectment, and enumerating various classes of cases of claims to land where the action will lie; among which a claim under any French or Spanish grant, warrant, or order of survey, which, prior to the 10th of March, 1804, had been surveyed by proper authority under the French or Spanish governments, and recorded according to the custom and usages of the country. Rev. Laws Miss. 343.

This would seem broad enough to embrace the claim now in question, and authorize the right to be tried in an action of ejectment in the state courts. How far the courts of [ \* 769 ] United States will adopt such practice, has come under the consideration of this court in several cases, *Robinson v. Campbell*, 3 Wheat. 212; *De la Croix v. Chamberlain*, 12 Wheat. 599; and the court has been strongly inclined against sustaining the action upon a mere equitable title, except perhaps where, by the statutes of a State, a title which would otherwise be deemed merely equitable, is recognized as a legal title, or a title which would be valid at law. We do not mean, however, to be understood as expressing any opinion upon this question in the present case. But as the cause has been tried upon the merits, and so argued here, we think best to decide upon the merits, without noticing the objection to the forms of the action.

An objection rather of a novel character has been made on the part of the plaintiff to the confirmation of the title in Choteau, because the defendant was one of the commissioners who confirmed the claim, and had purchased the lots of Choteau, before the confirmation. On reference to the proceedings of the commissioners, the allegation does not appear to be founded in fact; although he was one of the commissioners, he did not sit with them when this claim was confirmed. But it is a little singular that the plaintiff should himself give this confirmation in evidence in support of his own title, and then attempt to impeach it.

The main question in the cause, however, grows out of the instructions given by the court to the jury; and to a right understanding of that question, a brief statement of the case as it stood when the instruction was given becomes necessary.

The plaintiff, as the origin of his title, gave in evidence two certified

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Strother v. Lucas. 6 P.

copies of entries of surveys from what is called the *Livre Terrien*. The one, purporting to be an entry of a survey made for Rene Kiercereau of one by forty arpens; the other a survey purporting to have been made for Joseph Gamache for the same quantity. On the 29th of January, 1773, Gamache conveyed to Louis Chancillier one half of the lot surveyed for him, and on the 6th of April, 1781, Marie Reneux Robillar (the wife of Rene Kiercereau) conveyed to Louis Chancillier the lot surveyed for him. Chancillier cultivated a part of these lots until his death, in 1785; after his death, his widow, Madame Chancillier, became the purchaser of the one and [ \* 770 ] a \* half arpens of land, but did not take possession of or cultivate these lots; nor does it appear that she laid claim to them until about the year 1818; and in September, 1828, she sold the lots to George F. Strother, who conveyed the same to the plaintiff. Soon after the death of Chancillier, and some time in the year 1785, or 1786, Hyacinth St. Cyr was put into possession of the two lots by the syndic of the district, the fence in front not having been kept up; and from the proceedings of the commissioners introduced by the plaintiff himself, it appears that Kiercereau, on the 23d of October, 1793, conveyed to St. Cyr his claim to the lot surveyed for him, and on the same day Gamache conveyed to St. Cyr his claim to the lot surveyed for him. And by the same proceedings it appears that at a public sale, in the year 1801, made of the property of St. Cyr, Auguste Choteau became the purchaser of these lots, and on the 11th of January, 1808, he conveyed the same to the defendant. St. Cyr, from the time of his first entry on the lots in 1785, or 1786, continued to cultivate and possess them, and keep up his part of the fence until the whole common field inclosure was destroyed about the year 1798; and Choteau, from the time of his purchase in 1801, until he sold to the defendant, and the defendant from the time of his purchase, have continued to occupy the same to the present time, and in the year 1820 the claim to the two lots was confirmed to Auguste Choteau by the commissioners.

From this statement of the case, according to the plaintiff's own showing, there is a regular deduction of title or claim, from the persons for whom the lots were surveyed to the defendant. But it appears that those persons, Kiercereau and Gamache, sold their claim twice; in the first place to Louis Chancillier, under whom the plaintiff claims; and in the second place to St. Cyr, under whom the defendant claims. If these title papers were to be considered independent of the acts of congress and the proceedings of the commissioners, the plaintiff, being prior in point of time, would prevail, so far as depended upon the deduction of a paper title, and independent of the question of possession.

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Strother v. Lucas. 6 P.

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It becomes necessary, therefore, to inquire how far the acts of congress apply to and affect any part of these title-papers; keeping in mind that it is all the plaintiff's \* own [ \* 771 ] evidence; he having produced the proceedings before the commissioners, is not now at liberty to deny the facts therein stated.

No grant has been shown under which the plaintiff sets up his claim; his title was therefore incomplete; and, by the 4th section of the act of 1805, (vol. 3 Laws U. S. 653,) the person claiming the land was bound to deliver to the register of the land-office, or recorder of land titles, within the district where the land lies, a notice in writing stating the nature and extent of his claim, and also to deliver to the said register or recorder, for the purpose of being recorded, every grant, order of survey, deed, conveyance, or other written evidence of his claim. And the law directs that they shall be recorded by the register or recorder, &c., with a proviso, however, that where the lands are claimed by virtue of a complete French or Spanish grant, it shall not be necessary for the claimant to have any other evidence of his claim recorded than the original grant or patent, together with the warrant or order of survey, and the plat; but all the other conveyances or deeds shall be deposited with the register or recorder, to be laid before the commissioners. And the act then declares that if such person shall neglect to deliver such notice in writing of his claim, or cause to be recorded such written evidence of the same, all his right, so far as the same is derived from the first two sections of the act, shall become void, and forever thereafter barred. If any doubt should arise whether the original right claimed in this case comes within the first two sections of the act, that is removed by the act of 1807, (vol. 4 Laws U. S. 112,) which repeals the proviso to the 1st section of the act of 1805, and the power of the commissioners is enlarged. The 4th section declares that the commissioners shall have full power to decide, according to the laws and the established usages and customs of the French and Spanish governments, upon all claims to land within their respective districts, where the claim is made by any person or persons, or the legal representative of any person or persons who were, on the 20th of December, 1803, inhabitants of Louisiana, and for a tract not exceeding the quantity of acres contained in a league square, &c., which decision of the commissioners, when in favor of the claimant, shall be final against the United States. And the time is extended for delivering notices and evidences of \* the claim, but de- [ \* 772 ] claring that the rights of such persons as shall neglect so doing shall, so far as they are derived from or founded on any act of

congress, ever after be barred and become void, and the evidences of their claims never after admitted as evidence in any court of law whatever. There is no evidence that notice of the claim now set up was ever given as required by these laws, or that the deeds from Kiercereau and Gamache to Chancillier were ever delivered to be recorded as required by the law. And Madame Chancillier, having slept upon this claim for so great a length of time, from the year 1785 to 1818, there is every reason to conclude she had abandoned it; and these deeds cannot now, under the provisions of these laws, be received as evidence of any right to be established under the acts of congress. And it must have been understood upon the trial that the plaintiff sought to establish his right under these acts of congress, or he would not have produced the confirmation of the commissioners as evidence of his right. But, having relied upon it in support of his own claim, he ought not now to be permitted to deny that it was one properly submitted to the commissioners. Had he rested his claim upon a title derived from Chancillier, without the aid of the acts of congress, the evidences of his title would not have been affected by those acts; but the defendant would, in that case, have been fully protected by his length of possession. When, however, a part of the plaintiff's evidence was the proceedings of the commissioners upon this very claim, this court must consider the instruction of the judge as referring only to the effect and operation of the confirmation under the laws in relation to such claims. And in that view of the case the instruction was perfectly correct.

There is, however, some obscurity in the application of the instruction given by the court; but, from the evidence set out in the bill of exceptions, we cannot say there was any error. And the justice and law of the case, growing out of such a length of possession, are so manifestly with the judgment in the court below, if we look at the whole evidences on the record, that we feel disposed to give the most favorable interpretation to the instructions of the court. And we the more readily incline to think the light in which the instruction is here

considered was that in which it was understood on the trial,  
[ \* 773 ] \* because the counsel for the plaintiff in error has contended

on the argument here that this confirmation enures to the benefit of the owner of the claim; that the commissioners decide only the abstract right as against the United States, without regard to the person who sets up the claim. And it is upon this ground only that the plaintiff would have introduced in evidence the decision of the commissioners which was directly against his own right, he thereby probably expecting to destroy the effect of the adverse

*Ex parte Bradstreet.* 6 P.

possession, and make the possession, as well as the confirmation of the commissioners, enure to his benefit. But this view of the case cannot be sustained, and the judgment of the court below must be affirmed.

12 U. 410; 3 H. 317; 21 H. 481; 12 W. 321; 22 W. 262.

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*Ex parte MARTHA BRADSTREET, in the Matter of MARTHA BRADSTREET, Defendant, v. APOLLOS COOPER et al., Tenants.<sup>1</sup>*

6 P. 774.

Rule to show cause why a *mandamus* should not issue was granted, where it was sworn that the judge had neglected or refused to enter a judgment.

MR. JONES, of counsel for the defendant in the above-named cases, moved for a rule on the judge of the district court of the United States for the northern district of New York, to "show cause why a *mandamus* should not be awarded com- [ \*775 ] manding him,

1. To reinstate, and proceed to try and adjudge, according to the law and right of the case, the several writs of right and the *mises* thereon joined, lately pending in said court, and said to have

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<sup>1</sup> Philadelphia, 21st July, 1832.

Sir: In the case *Ex parte Bradstreet v. Cooper et al.*, on the motion by Mr. Jones for a *mandamus* to the district court of the northern district of New York, I dissented from the order of the court in the following respects.

1. In ordering the suits to be reinstated.
2. Requiring the court to permit amendments to be made.

The ground of my dissent was, that a *mandamus* was not a proper remedy, that the dismissal of a suit for want of jurisdiction was a final judgment, on which a writ of error could be brought; but that the supreme court had no power to issue a *mandamus* in such a case, the judgment being strictly a judicial act; and that, though an appellate court could direct amendments, it could only do so when a case was before them by writ of error or appeal.

It was stated in the affidavit that the court had actually rendered a judgment of dismissal for the want of jurisdiction, but that there was no entry of it on the record, and that the judge had neglected or refused an application to direct it to be done. I had no doubt that this was a proper case for a rule to show cause why a *mandamus* should not issue directing the entry of such judgment as had been rendered by the court, so as to give the plaintiff the benefit of a writ of error. My opinion was confined to this subject-matter.

The order of the court, of which you inclosed me a copy in your note of to-day, which is herewith returned, was not shown to me at the time it was made; and until to-day I was not aware of its extent on the last point, embracing matters not taken into consideration by me.

Yours, &c.,

HENRY BALDWIN.

RICHARD PETERS, Esquire, Reporter of Supreme Court.

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*Ex parte Bradstreet.* 6 P.

been dismissed by order of said court, between Martha Bradstreet, defendant, and Apollos Cooper *et al.*, tenants.

2. Requiring said court to admit such amendments in the form of pleading, or such evidence as may be necessary to aver or to ascertain the jurisdiction of said court in the several suits aforesaid.

3. Or if sufficient cause should be shown by the said judge on the return of this rule, or should otherwise appear to this court, against a writ of *mandamus* requiring the matters and things aforesaid to be done by the said judge, then to show cause why a writ of *mandamus* should not issue from this court, requiring the said judge to direct and cause full records of the judgments or orders of dismission in the several suits aforesaid, and of the processes of the same to be duly made up and filed, so as to enable this court to reëxamine and decide the grounds and merits of such judgments or orders upon writs of error, such records showing upon the face of each what judgments or final orders dismissing, or otherwise definitively disposing of said suits, were rendered by the said district court, at whose instance, upon what grounds, and what exceptions or objections were reserved or taken by said defendant, or on her behalf, to the judgments or decisions of the said district court in the premises, or to the motions whereon such judgments or decisions were found; and what motion or motions, application or applications, were made to said court by the defendant, or on her behalf; and either granted or overruled by said district court, both before and after said judgments or decisions dismissing or otherwise finally disposing of said suits; especially what motions or applications were made by said defendant, or on her behalf, to said district court, to be admitted to amend her counts in the said suits, or to produce evidence [ \* 776 ] \* to establish the value of the lands, &c., demanded in such counts, together with all the papers filed and proceedings had in said suits respectively.

On consideration whereof, it is now here considered and ordered by this court, that the rule prayed for be and the same is hereby granted, returnable to the 1st day of the next January term of this court, to wit, on the 2d Monday of Januarv, in the year of our Lord 1833. *Per MARSHALL, C. J.*

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Boyce v. Grundy. 6 P.

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THE UNITED STATES, Plaintiff, v. ZALEGMAN PHILLIPS.

6 P. 773.

A *nol pros.* having been entered in the circuit court, this writ of error thereto was dismissed on motion of the attorney-general.

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BOYCE *et al.* v. FELIX GRUNDY.

6 P. 777.

WHERE the record showed that no appeal bond was taken, the appeal was dismissed, on motion.

## DECISIONS

OF THE

# SUPREME COURT OF THE UNITED STATES.

JANUARY TERM, 1833.

JUDGES DURING THE TIME OF THESE REPORTS.

HON. JOHN MARSHALL, CHIEF JUSTICE.  
HON. WILLIAM JOHNSON,  
HON. GABRIEL DUVALL,  
HON. JOSEPH STORY,  
HON. SMITH THOMPSON,  
HON. JOHN M'LEAN, AND  
HON. HENRY BALDWIN,<sup>1</sup> }  
ROGER B. TANEY, Esq., ATTORNEY-GENERAL.  
RICHARD PETERS, Esq., REPORTER.  
HENRY ASHTON, Esq., MARSHAL.  
WILLIAM T. CARROLL, Esq., CLERK.  
} ASSOCIATE JUSTICES

### THE UNITED STATES, Plaintiffs in Error, v. GEORGE MACDANIEL.

7 P. 1.

The courts may allow to a clerk in a department, by way of offset, an equitable claim, for services rendered to the government under the orders of the head of the department, though there be no act of congress providing for the case, and an auditor of the treasury could not allow the claim. (5 Stats. at Large, 349, § 3; 510, § 2.)

THE case is stated in the opinion of the court.

*Taney*, (attorney-general,) for the United States.

*Coxe and Jones*, contra.

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<sup>1</sup>Mr. JUSTICE BALDWIN was prevented attending the court by indisposition.

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United States v. Macdaniel. 7 P.

\* M'LEAN, J., delivered the opinion of the court. [ \* 10 ]

A writ of error is prosecuted in this case by the United States, to reverse a judgment of the circuit court for the District of Columbia.

The action was brought by the government to recover from the defendant a balance charged against him on the books of the treasury department, amounting to the sum of \$988.94.

In his defence, the defendant proved that he was a clerk in the navy department, upon an annual salary of \$1,400; and that he also acted as the agent for the payment of the moneys due to the navy pensioners, the privateer pensioners, and for the navy disbursements. That the moneys applied to the use of these [ \* 11 ] objects were placed in his hands by the government. That he received the annual sum of \$250 for his services in the payment of pensioners; but that for ten or fifteen years he received one per cent. on moneys paid by him for navy disbursements.

That these disbursements amounted to from the sum of fifty, to a hundred thousand dollars a year, and that no security was required from him. He claimed the usual allowance of one per cent. upon certain sums of money, disbursed by him, which had been rejected by the treasury officers, but which, if allowed, would show that he was not indebted to the government.

Upon this state of facts, the attorney for the United States prayed the court to instruct the jury that if they should believe the same to be true, that still the defendant had no right by law to the commissions which he claims, as the sum charged had never been allowed to him by any department of the government; and that it was not in the power of the jury to allow the commissions on the trial. But, the court refused to give the instructions, and a bill of exceptions was taken.

Two questions are made by the bill of exceptions, for the decision of this court.

1. Whether the defendant has a right to compensation for the services charged.

2. Whether, if such right existed, it should have been allowed on the trial, as the proper department had decided against it.

As to the second ground, it may be proper to remark, that the rejection of the claim of the defendant by the treasury department, formed no objection to the admission of it by the court, as evidence of offset to the jury. Had the claim never been presented to the department for allowance, it would not have been admitted as evidence by the court. But, as it had been made out in form, and presented to the proper accounting officer, and was rejected, the circuit court did

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United States v. Macdaniel. 7 P.

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right in submitting it to the jury, if the claim was considered to be equitable.

On the part of the government, it is contended that, in a case like the present, the court, in admitting evidence of offset against [ \* 12 ] the claim of the government, is limited, not only to "such items as were exhibited to the auditor, but to such as were strictly legal, and which he should have allowed.

This limitation on the power of the court, cannot be sanctioned. It is admitted, that a claim which requires legislative sanction is not a proper offset, either before the treasury officers or the court. But there may be cases, in which, the service having been rendered, a compensation may be made within the discretion of the head of the department; and in such cases, the court and jury will do, not what an auditor was authorized to do, but what the head of the department should have done, in sanctioning an equitable allowance.

It being clear, that the circuit court did not err in allowing the offset of the defendant, if he had a right to compensation for the services rendered, the validity of this right will be the next point for inquiry.

On the part of the government, it is contended, that the head of a department may vary the duties of the clerks in his department, so as to give dispatch and regularity to the general business of the office; but that by such changes, no clerk or other officer of the department, has a right to an increase of compensation. That it appears in the present case there was no increase of labor, as to time; as the services for which compensation is charged were rendered during office hours. And it is also insisted that the duties discharged belonged to another officer of the government; and that it is not competent for any officer of the government, even the President himself, to take from one officer certain duties which the law has devolved upon him, and require another to discharge them.

By the act of 27th March, 1804,<sup>1</sup> the President was authorized to "attach to the navy-yard at Washington city, and to frigates and other vessels, laid up in ordinary in the eastern branch, a captain of the navy, who shall have the general care and superintendence of the same, and shall perform the duties of agent to the navy department"

Under this law, the attorney-general contends it was the duty of the commandant at the navy-yard to make the disbursements which were made by the defendant; and, consequently, no compensation for such services can be allowed to the defendant.

[ \* 13 ] \* Whatever may now be the construction of this act as it regards the duties of the commandant, it appears he was

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United States v. Macdaniel. 7 P.

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not required to make the disbursements which were made by the defendant; and, consequently, they could not have been considered, at that time, as forming a part of the duties of commander of the navy-yard.

By the act of the 10th July, 1832,<sup>1</sup> congress authorized the appointment of a separate and, permanent agent at Washington, who shall be entitled "to the same compensation, and under the same responsibilities, and to be governed by the same laws and regulations which now are or may hereafter be adopted for other navy agents;" and it is made his "duty to act as agent not only for the navy-yard in the city of Washington, but for the navy department, under the direction of the secretary thereof, in the payment of such accounts and claims as the secretary may direct."

By this act, that part of the act of 1804 which required the commander of the navy-yard at the city of Washington to act as agent, is repealed.

Until the defendant was removed from office, in 1829, he continued to discharge the duties as special agent for the navy disbursements. But after that period, it is stated that a new construction of the act of 1804 being given, those duties were required to be performed by the commander of the navy-yard, who continued to discharge them, until an agent was appointed under the act of the last session.

Until this time the act of 1804 seems never to have been construed, by the head of the navy department, as providing for the special services performed by the defendant; and it would seem from the provision of the late act, which requires the agent to act not only for the navy-yard, but for the navy department, and to "pay such accounts and claims as the secretary may direct," that the former construction was correct; and the court are of this opinion. These duties would not have been so specially stated in the act of last session, if they had been considered by congress as coming within the ordinary duties of an agent for the navy-yard. But, independent of this consideration, it is enough to know that the duties in question were discharged by the defendant, under the construction given to the law by the secretary of the navy. [ \*14 ]

It will not be contended that one secretary has not the same power as another to give a construction to an act which relates to the business of the department. And no case could better illustrate the propriety and justice of this rule, than the one now under consideration.

The defendant having acted as agent for navy disbursements for a great number of years under different secretaries, and having uni-

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<sup>1</sup> 4 Stats. at Large, 569.

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formly received one per cent. on the sums paid as his compensation, he continues to discharge the duties and receive the compensation, until a new head of the department gives a different construction of the act of 1804, by which these duties are transferred to the commander of the navy-yard. By this new construction, whether right or wrong, no injustice is done to the defendant, provided he shall be paid for services rendered under the former construction of the same act. But such compensation has been refused him.

It is insisted that as there was no law which authorized the appointment of the defendant, his services can constitute no legal claim for compensation, though it might authorize the equitable interposition of the legislature. That usage, without law or against law, can never lay the foundation of a legal claim, and none other can be set off against a demand by the government.

A practical knowledge of the action of any one of the great departments of the government, must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for every thing he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government, would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise

of its powers, there are numberless things which must be [ \*15 ] done, that can neither be anticipated nor defined, and which are essential to the proper action of the government. Hence, of necessity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usages can have a retrospective effect, but must be limited to the future.

Usage cannot alter the law, but it is evidence of the construction given to it, and must be considered binding on past transactions.

That the duties in question were discharged by the defendant during office hours, can form no objection to the compensation claimed. They were required of him by the head of the department, and being a subordinate, he had no discretion to decline the labor and responsibility thus imposed. But seeing that his responsibility would be greatly increased, and perhaps his labor, the secretary of the navy increases his compensation, as in justice he was bound to do.

In discharging the ordinary duties of clerk, the compensation of

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the defendant was fixed at \$1,400; but when the duties of agent for navy disbursements were superadded to those of clerk, there is an adequate augmentation of pay given to him. Is there any thing unreasonable or unjust in this?

But it is said, there was no law authorizing such an officer to be appointed.

That the duties performed by the defendant were necessary for the public service, has not been denied; nor is it pretended that the commissions allowed him were higher than the amount paid for similar services elsewhere. The payments by him were legal, and being made under the immediate direction of the secretary of the navy, errors were avoided which might have occurred under other circumstances.

It must be admitted that there was no law authorizing the appointment of the defendant, nor was it considered necessary that there should be a special statutory provision on the subject. For the convenience of the officers of the navy and others who were engaged in the service of the department, certain disbursements became necessary; and as no law specially \*authorized the [ \*16 ] appointment of an agent for this purpose, they were required to be made by a clerk.

In this manner were these payments made for fifteen years, under different secretaries of the navy, and the same rate of compensation as now claimed was allowed. The charge was sanctioned by the accounting officers of the treasury department, and no objection was ever made to it by the committees of congress who annually inspected the books of the department.

It would seem, therefore, whether the claim of the defendant be viewed in reference to the services performed or to the long sanction which has been given to them by the navy and treasury departments, its justice is unquestionable. The government does not deny the performance of the services by the defendant, nor that they do in equity entitle him to compensation; but, as his appointment was without legal authority, it is insisted he can obtain compensation only by application to congress.

An action of *assumpsit* has been brought by the government to recover from the defendant the exact sum which in equity it is admitted he is entitled to receive for valuable services rendered to the public in a subordinate capacity, under the express sanction of the head of the navy department. This sum of money happens to be in the hands of the defendant, and the question is, whether he shall, under the circumstances, be required to surrender it to the government and then petition congress on the subject.

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A simple statement of the case would seem to render proper a very different course.

If some legal provision be necessary to sanction the payment of the compensation charged, application should be made to congress by the head of the department who required the service and promised the compensation. But no such provision is necessary. For more than fifteen years the claim has been paid for similar services, and it is now too late to withhold it for services actually rendered. It would be a novel principle to refuse payment to the subordinates of a department, because their chief, under whose direction they had

[ \*17 ] faithfully served the public, had mistaken his own powers and had given an \*erroneous construction of the law. But

the case under consideration is stronger than this. It is not a case where payment for services is demanded, but where the government seeks to recover money from the defendant to which he is equitably entitled for services rendered. This court cannot see any right, either legal or equitable, in the government, to the sum of money for the recovery of which this action was brought. They think that the secretary of the navy, in authorizing the defendant to make the disbursements, on which the claim for compensation is founded, did not transcend those powers which, under the circumstances of the case, he might well exercise. And they therefore think that the circuit court did not err in refusing to give the instructions to the jury as prayed by the attorney of the United States. The judgment of the circuit court is therefore affirmed.

7 P. 18; 8 P. 150; 15 P. 886; 16 P. 221; 4 H. 80; 8 H. 88; 9 H. 487; 7 Wal. 152;  
9 W. 765; 5 O. 763.

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**THE UNITED STATES, Plaintiffs in Error, v. ELEAZAR W. RIPLEY**

7 P. 18.

For extra services performed by a military officer under the sanction of the government, or under circumstances of peculiar emergency, the courts may allow a reasonable compensation, by way of offset. (5 Stats. at Large. 349, § 3; 510, § 2.)

THE case is stated in the opinion of the court.

*Taney*, (attorney-general,) for the United States.

No counsel *contra*

[ \*23 ] M'LEAN, J., delivered the opinion of the court.

The United States have brought this writ of error, to reverse a judgment of the court of the United States for the eastern district of Louisiana.

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United States v. Ripley. 7 P.

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An action was brought in that court to recover from the defendant a certain amount of public money, for which he had failed to account, and neglected to pay over as the law requires.

As the facts of the case appear in the following bill of exceptions, it will be unnecessary to advert specially to the pleadings in the cause.

"Be it remembered, that on this 28th May, 1830, on the trial of this cause, the defendant offered the following testimony. That he entered into the army of the United States in the year 1812 as a lieutenant-colonel; was promoted at different periods until he attained the rank of major-general by brevet, which rank he held until the day of his resignation of his commission \* in [ \* 24 ] the year 1817. During this interval, he was engaged in active service, and received the pay and emoluments to which his rank entitled him, under the laws of the United States, and the regulations of the President of the United States and of the department of war.

"Large sums of money passed through his hands to various officers in the army under his command, or were disbursed by him for the supplies of the troops by him commanded. He claimed to be allowed a commission on these disbursements, and offered evidence to prove that similar allowances had been made to other officers of the line of the army, who had been charged with the disbursements of public moneys; and also offered evidence to prove what would be a fair rate of compensation for such services.

"The defendant also claimed an allowance of extra pay or compensation for services performed by him, not within the line of his duty, in preparing plans for fortifications, and for procuring and forwarding supplies of provisions, &c., to troops of the United States, beyond the limits of his military command, and offered testimony to prove the value of said services. To the introduction of all which testimony the attorney for the United States objected, on the ground that no other or further compensation could be allowed for disbursements made, or extra services rendered, as aforesaid, than such as were sanctioned or defined by the laws of the United States, by instructions of the President of the United States, or by regulations of the war department, legally made. But the court overruled the objection, and admitted the testimony."

And the testimony being closed, the attorney of the United States prayed the court to instruct the jury, that no allowance in the form of commissions or otherwise, for moneys disbursed as aforesaid, or extra compensation for services rendered, under the circumstances before stated, could be admitted as a legal and equitable set-off

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against the claim of the United States, other than such as were sanctioned and defined by the laws of the United States, by instructions of the President, or by regulations of the department of war, legally made. But the court refused so to instruct the jury, and [ \* 25 ] stated to them that the defendant \* was entitled to credit for commissions on disbursements and allowances for extra services, and that they must judge of the rate and extent of such commissions and allowances.

The jury rendered a verdict against the United States, and reported a balance due from them to the defendant.

The claim set up by the defendant, and which was allowed by the jury, rested on two grounds.

1. For certain disbursements made by him.
2. For preparing plans for fortifications, and for procuring and forwarding supplies of provisions, &c., for the troops beyond his military command. The latter service is said, in the bill of exceptions, not to have been within the line of his duty; but no such statement is made in regard to the former.

In behalf of the United States it is contended, that the court can only allow credits which the auditor should have allowed; and that unliquidated damages cannot be set off at law.

In the case of the United States *v.* Macdaniel, 7 Pet. 1, which has been decided at the present term, this court has said, that the powers of the court and jury to admit credits against a demand of the government, were not limited to items which should have been allowed by the auditor. That in all cases where an equitable claim against the United States is set up by a defendant, which, under the circumstances, should have been allowed by an exercise of the discretionary powers of the President or the head of a department, it should be submitted to the jury, under the instructions of the court.

Equitable, as well as legal claims against the government, are contemplated by the law as proper items of credit on the trial; and so this court decided in the case of the United States *v.* Wilkins, reported in 6 Wheat. 135.

It is presumed that every person who has been engaged in the public service, has received the compensation allowed by law, until the contrary shall be made to appear. The amount of compensation in the military service may depend, in some degree, on the regulations of the war department; but such regulations must be uniform, and applicable to all officers under the same circumstances. So far, then, as it regards the pay of the defendant for services rendered in the line of his duty, it would seem not to be difficult for him [ \* 26 ] to show certain regulations \* of the war department, or

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instructions of the President, within the rule stated in the bill of exceptions by the attorney of the United States.

If, however, the disbursements made, for which compensation is claimed, were not such as were ordinarily attached to the duties of the office held by the defendant, the fact should have been so stated; and also that the service was performed under the sanction of the government, or under such circumstances as rendered the extra labor and responsibility assumed by the defendant in performing it necessary. Should the accounting officers of the treasury department refuse to allow an officer the established compensation which belongs to his station; the claim, having been rejected by the proper department, should unquestionably be allowed, by way of set-off, to a demand of the government, by a court and jury.

And it is equally clear that an equitable allowance should be made in the same manner, for extra services performed by an officer which did not come within the line of his official duty, and which had been performed under the sanction of the government, or under circumstances of peculiar emergency. In such a case, the compensation should be graduated by the amount paid for like services, under similar circumstances. Usage may safely be relied on in such cases, as fixing a just compensation.

The allowancees claimed under the second head, for services which did not come within the range of his official duties, should have been shown by the defendant to have been performed with the sanction of the government, or under circumstances as above stated.

However valuable the plans for fortifications prepared by the defendant may have been, unless they were prepared at the request of the government, or were indispensable to the public service; he cannot claim a compensation for them, as a matter of right.

The distinguished services rendered by the defendant during the late war, are advantageously known to the country; but the claims set up in the case under consideration must be brought within the established rules on the subject, before they can receive judicial sanction. And as, in the opinion of \*this court, [ \* 27 ] the district court erred in their instructions to the jury, which were given without qualification, the judgment must be reversed, and the cause remanded for proceedings *de novo*.

15 P. 836; 4 H. 80; 8 H. 88; 9 H. 487; 9 W. 765; 1 O. 564.

THE UNITED STATES, Plaintiffs in Error, *v.* THOMAS FILLEBROWN, JR.  
7 P. 28.

A person appointed secretary of the board of commissioners of the navy hospital fund, to execute "such duties as may be required of him by the board," for a stated salary, and who performs other services at the request of the board, with the understanding that he is to be paid therefor such a commission as has been usually paid for similar services, is entitled to a credit, according to that understanding, by way of offset in an action against him by the United States. (5 Stats. at Large, 349, § 3; 510, § 2.)

The board of commissioners of the navy hospital fund not being required by any act of congress to record its proceedings, oral evidence of its acts is admissible.

THE case is stated in the opinion of the court.

Taney, (attorney-general,) for the United States.

Coxe and Jones, contra.

[ \* 42 ] \*THOMPSON, J., delivered the opinion of the court.

This case comes before the court on a writ of error to the circuit court of the District of Columbia. The action was brought to recover a balance certified at the treasury against the defendant, on the settlement of his accounts as secretary of the commissioners of the navy hospital fund. Upon this settlement, the defendant set up a claim for compensation, for what he considered extra services, in bringing up and arranging the records of the board antecedent to his appointment as secretary, and also for commissions on the disbursements of moneys under the orders of the board. These claims had been rejected by the accounting officers of the treasury, and

were now set up by way of set-off against the demand on [ \* 43 ] the part \* of the United States; and the questions before the circuit court were, whether the defendant was entitled to the compensation he claimed.

Upon the trial, after the testimony was closed, the counsel for the United States prayed the court to instruct the jury as follows:—

1. That if, from the evidence aforesaid, it should appear to them that the defendant had accepted the appointment of secretary of the board of navy hospital commissioners upon the terms mentioned in the said appointment, and in the letter of Samuel L. Southard to him, of the 7th of November, 1825, as hereinbefore stated; that in that case he was not entitled to any extra compensation for the disbursement of the moneys belonging to the said navy hospital fund; and that he was only entitled to \$250 a year, for the whole of the services performed by him for the said board.

2. That if they should be satisfied, by the evidence aforesaid, that

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the said board of commissioners had never passed any order or resolution for the payment of any commission, upon the moneys disbursed by the defendant for the said board; and that the claim for commissions which he now makes, had never been sanctioned or settled by the said board; that it is not competent for him now to set up the said claim for commissions against the claim of the United States, for which this suit is brought.

Which instructions the court refused to give; but at the instance of the defendant's counsel gave other instructions which will be hereafter noticed.

The jury found a verdict for the defendant, and certified a balance in his favor, against the United States, for \$430; and the case comes here on a bill of exceptions.

Whether the first instruction asked on the part of the United States ought to have been given, must depend upon the defendant's appointment as secretary, and the extent of his duties under that appointment. The court was requested to instruct the jury, that if the defendant had accepted the appointment on the terms mentioned, he was entitled to no compensation \*beyond [ \* 44 ] his salary of \$250, for any services performed by him for the board.

The second instruction asked, involves the inquiry whether some order or resolution of the board for the payment of the commissions was not indispensably necessary to entitle the defendant to the allowance claimed by him.

The defendant was appointed secretary, at a regular meeting of the board, on the 7th of November, 1825; and so far as his duties are defined, they are to be collected from the following resolution:—

"Resolved, that a secretary be appointed to this board, to take charge of the books, papers, &c., belonging to the hospital fund, and to execute such duties relative thereto, as may be required of him by the board, for which services he shall be allowed the sum of \$250 per annum."

The authority of the commissioners to appoint a secretary has not been denied; and this same authority must necessarily exist to appoint agents and superintendents for the management of the business connected with the employment of the fund; and which, in the absence of any regulation by law on the subject, must carry with it a right to determine the compensation to be allowed them.

It is admitted, on the part of the United States, that the defendant's being secretary of the board, forms no objection to his performing other services not included in his duty as secretary, and receiving a compensation therefor in the same manner as any other person might.

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The terms on which the defendant accepted the appointment of secretary, being to execute such duties, relative thereto, as should be required of him by the board, it becomes proper to examine how the board considered the appointment, and what duties were required of him as secretary.

It is proper here to inquire, how the secretary of the navy, as one of the commissioners, stood in relation to the other members of the board.

It is evident from the manner in which this fund was created, and the purposes and objects to which it was applied, that the general and active superintendence over it belonged appropriately [ \* 45 ] \* to the secretary of the navy. It was, therefore, almost a matter of course that the board should commit to him the principal management of the business, and consider him the agent of the board for that purpose. In addition to this, he was actually constituted such agent by the board.

Mr. Southard, in his deposition, states that he was, by the direction of the board, and by the previous practice and usage, acting commissioner of the fund, and attended to all matters connected with it. But, when any new arrangements were to be made, or money to be expended on a new object, he consulted with, and had the approval and authority of the whole board. And all his acts were considered as authorized and sanctioned by the board.

With respect to the \$125 claimed for six months' salary, Mr. Southard is very explicit. This allowance, he says, was made for extra services, and related to a time previous to his appointment; and that the allowance had the approbation of the board. This was a service not required or considered by the board as coming within his duty as secretary under his appointment, and a stipulated compensation agreed to be paid him therefor. It is not perceived what possible objection can exist against his being allowed this stipulated sum. Whether or not it was more than a just compensation for his services, is a matter which this court cannot inquire into. Indeed, that has not been pretended, if he is entitled to any thing beyond his salary of \$250.

With respect to the commissions, Mr. Southard says, that subsequent to the appointment of the defendant as secretary, the commissioners were enabled, by appropriations, and collecting money belonging to the fund from various sources, to proceed to apply the funds to the establishment of navy hospitals as required by the act of congress. That these funds were placed in the hands of the treasurer of the United States, as the treasurer of the commissioners; and that, in collecting and disbursing the fund, it was found indis-

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pensable to have an agent who should attend carefully to it, and be responsible to the board. That this did not belong to the duties of the secretary. But that it was thought best to give the agency to him on \* account of his acquaintance with every [ \* 46 ] part of the interest of the fund, and his fitness to discharge the duty. That he was appointed the agent with the understanding that he should receive a suitable compensation for the services he should render in that capacity. That it was the understanding of the commissioners that he should receive compensation in the mode, and according to the practice of the government in other similar cases. That he is under the impression that this was to be by a percentage on the money disbursed; and that he is also under the impression that he did, by the authority of the board, allow one or more of the accounts presented by the defendant in conformity to the facts and principles he has detailed.

From this testimony, it is very certain that Mr. Southard considered the agency of the defendant in relation to the fund as entirely distinct from his duty as secretary, and for which he was to have extra compensation. And it is fairly to be collected from this deposition, that all this received the direct sanction of all the commissioners. But, whether it did or not, it was binding on the board; for the secretary of the navy was the acting commissioner, having the authority of the board for doing what he did, and his acts were the acts of the board, in judgment of law. It was, therefore, an express contract entered into between the board or its agent and the defendant; and it was not in the power of the board, composed even of the same men, after the service had been performed, to rescind the contract, and withhold from the defendant the stipulated compensation. There is no doubt the board, composed of other members, had the same power over this matter as the former board. But it cannot be admitted that it had any greater power. The rejection, therefore, of these claims on the 7th of September, 1829, after all the services had been performed by the defendant, can have no influence upon the question.

It has been argued, on the part of the United States, that the sanction of the secretary of the navy, as one of the commissioners, can give no right to the allowance without the concurrence of the other members. This proposition is not denied; but the testimony of Mr. Southard, as has been already shown, goes fully to establish the fact, that he had the general authority \* of the [ \* 47 ] board to act as its agent, and leaves little or no doubt of the sanction of the board to the particular claims in question. It was, however, pretty strongly intimated at the bar, though it was not

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understood to be positively asserted, that these facts could not be established by parol, but that the proceedings of the board must be shown in writing. And this would seem to be one of the questions intended to be made under the second prayer. It would be a sufficient answer to this, that no objection was made at the trial to the admission of the evidence. But the objection, if it had been made, could not have been sustained. There is no general principle of law known to the court, and no authority has been shown establishing the doctrine, that all the proceedings of such boards must be in writing, or that they shall be deemed void, unless the statute under which they act shall require their proceedings to be rendered to writing. It is certainly fit and proper that every important transaction of the board should be committed to writing. But the law imposes no such indispensable duty. The act of 1811,<sup>1</sup> 4 Laws U. S. 311, constituting the fund for navy hospitals, only makes the secretaries of the navy, treasury, and war departments, a board of commissioners, by the name and style of commissioners of navy hospitals, and gives some general directions in what way the fund is to be employed; but the mode and manner of transacting their business is not in any respect prescribed. It is not true even with respect to corporations, that all their acts must be established by positive record evidence. In the case of the Bank of the United States *v. Dandridge*, 12 Wheat. 69, this court says: "We do not admit as a general proposition, that the acts of a corporation are invalid merely from an omission to have them reduced to writing, unless the statute creating it makes such writing indispensable as evidence, or to give them an obligatory force. If the statute imposes such restriction it must be obeyed." Considering, then, the testimony of Mr. Southard as competent evidence to establish the acts of the board, it shows very clearly, that the services rendered by the defendant, and for which he claims compensation, were not embraced within his duties as secretary of the board, but were extra services, for which the commissioners agreed to make him compensation.

[ \* 48 ] \* Another question may perhaps arise under the latter branch of the second prayer, whether the sanction or approval by the board of commissioners was an indispensable preliminary step to entitle the defendant to set up in the present action his claim against the demand of the United States. And we think it was not. If the board had authority to employ the defendant to perform the services which he has rendered, and these services have been actually rendered at the request of the board, the law implies a promise to pay for the same.

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<sup>1</sup> 2 Stats. at Large, 650.

## United States v. Fillebrown. 7 P.

This principle is fully established in the case of the United States *v.* Wilkins, 6 Wheat. 143, which brought under the consideration of the court the act of the 3d of March, 1797,<sup>1</sup> 2 Laws U. S. 594, providing for the settlement of the accounts between the United States and public receivers. And the court says, "there being no limitation as to the nature and origin of the claims for a credit which may be set up in the suit, we think it a reasonable construction of the act, that it intended to allow the defendant the full benefit at the trial of any credit, whether arising out of the particular transaction for which he was sued, or out of any distinct and independent transaction, which would constitute a legal or equitable set-off, in whole or in part, of the debt sued for by the United States," subject, of course, to the requirement of the act, that the claim must have been presented to the proper accounting officers and disallowed.

The circuit court, therefore, properly refused to give the instructions asked on the part of the United States.

The instructions given to the jury are as follows:—

If the jury believe from the evidence, that the regular duties to be performed by the defendant as secretary to the commissioners of the navy hospital fund, at the stated salary of \$250 per annum, did not extend to the receipt and disbursement of the fund; that the duty of receiving and disbursing the fund was required of and performed by him as an extra service, over and above the regular duties of his said appointment; that it has been for many years the general practice of the government and its several departments to allow to persons, though holding offices or clerkships, for the proper duties of which they receive stated salaries or other fixed compensation, [ \* 49 ] commissions over and above such salaries or other compensation, upon the receipts and disbursements of public moneys appropriated by law for particular services, when such receipts and disbursements were not among the ordinary and regular duties appertaining to such offices or clerkships, but superadded labor and responsibility, apart from such ordinary and regular duties; and that the defendant took upon himself the labor and responsibility of such receipts and expenditures of the navy hospital fund at the request of said commissioners, or with an understanding on both sides that he should be compensated for the same as extra service, by the allowance of a commission on the amount of such receipts and expenditures, then it is competent for the jury in this case to allow such commissions to the defendant on the said receipts and disbursements as the jury may find to have been agreed upon between the said

<sup>1</sup> 1 Stats. at Large, 512.

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commissioners and the defendant; or in the absence of any specific agreement fixing the rate of commissions, such rate as the jury shall find to be reasonable, and conformable to the general usage of the government and its departments in the like cases.

These instructions were entirely correct, and in conformity to the rules and principles laid down in the former part of this opinion.

Another bill of exceptions was taken to the ruling of the court, with respect to evidence of usage.

The record states, that upon the trial of this cause the defendant offered to prove, by the testimony contained in the preceding bill of exceptions, the general usage of the different departments of the government in allowing commissions to the officers of government upon disbursements of money under a special authority, not connected with their regular official duties. The counsel of the United States objected to the admission of parol evidence to prove such usage, but the court permitted the evidence to be given.

The real point of this exception is not very apparent. From the form in which it is put, it would seem that the objection was to the admission of parol evidence of the usage. But this probably was not the restricted sense in which the objection was intended to [ \*50 ] be made. The offer, however, was not to introduce new evidence of usage, but to prove it by the testimony contained in the preceding bill of exceptions. It amounted therefore, to nothing more than a mere inference or deduction from the evidence already before the court and jury, and which had been admitted without objection. But we see no grounds for objection against the usage offered to be proved, and the purpose for which it was so offered, as connected with the very terms upon which the defendant was employed to perform the services. It was not for the purpose of establishing the right, but to show the measure of compensation, and the manner in which it was to be paid. Mr. Southard states that it was the understanding of the commissioners that the defendant was to receive compensation, in the mode and according to the practice of the government in other similar cases. And the usage offered to be shown was, that such compensation was made by allowing commissions on the disbursement of the money expended; and in this point of view it was entirely unexceptionable.

We are accordingly of opinion that the judgment must be affirmed

15 P. 836; 16 P. 221; 4 H. 80; 8 H. 83; 9 H. 487; 9 W. 765.

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United States v. Percheman. 7 P.

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**THE UNITED STATES, Appellants, v. JUAN PERCHEMAN, Appellee.**

7 P. 51.

A paper writing, making a grant by a royal officer of Spain, in Florida, addressed to a public officer whose duty it was to keep the original and issue a copy, need not be produced; the copy issued by the proper officer is an original.

Under the act of May 26, 1830, (4 Stats. at Large, 405,) concerning land claims in Florida, the district court had jurisdiction of a claim rejected by the commissioners; such a rejection not being final action thereon within the meaning of that act.

Under the 8th article of the treaty between the United States and Spain, of February 22, 1819, (8 Stats. at Large, 252,) the title to lands which had been granted by the king of Spain, was confirmed by force of the instrument itself.

Though a presumption arises from the grant itself that the officer had authority to make it, the court proceeded to examine the proceedings, it being alleged they were void on their face.

The objection that the petitioner has conveyed the land to a third person is not to be inquired into.

**THE case is stated in the opinion of the court.**

*Taney, (attorney-general,) for the United States.*

*White, contra.*

\* MARSHALL, C. J., delivered the opinion of the court. [ \* 82 ]

This is an appeal from a decree pronounced by the judge of the superior court for the district of East Florida, confirming the title of the appellee to 2,000 acres of land lying in that territory, which he claimed by virtue of a grant from the Spanish governor, made in December, 1815. The title laid before the district court by the petitioner, consists of a petition presented by himself to the governor of East Florida, praying for a grant of 2,000 acres of land in the place called Ockliwaha, situated on the margins of St.

John's River; which \* he prays for in pursuance of the royal [ \* 83 ] order of the 29th of March, 1815, granting lands to the military who were in St. Augustine during the invasion in the years 1812 and 1813; to which the following grant is attached.

St. Augustine of Florida, 12th of December, 1815. Whereas this officer, the party interested, by the two certificates inclosed, and which will be returned to him for the purposes which may be convenient to him, has proved the services which he rendered in the defence of this province, and in consideration also of what is provided in the royal order of the 29th of March last past, which he cites, I do grant him the 2,000 acres of land which he solicits, in absolute property, in the indicated place, to which effect let a certified copy of this petition and decree be issued to him from the secretary's office, in order that it may be to him in all events an equivalent of a title in form.

ESTRADA.

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In a copy of the grant, certified by Thomas de Aguilar, secretary of his Majesty's government, the words "which documents will at all events serve him as a title in form," are employed instead of the words "in order that it may be to him in all events an equivalent of a title in form."

The petitioner also filed his petition to the governor for an order of survey dated the 31st of December, 1815, which was granted on the same day; and a certificate of Robert M'Hardy, the surveyor, dated the 20th of August, 1813, that the survey had been made.

The attorney of the United States for the district, in his answer to this petition, states that on the 28th of November, 1823, the petitioner sold and conveyed his right in and to the said tract of land to Francis P. Sanchez, as will appear by the deed of conveyance to which he refers; that the claim was presented by the said Francis P. Sanchez, to the register and receiver, while acting as a board of commissioners to ascertain claims and titles to land in East Florida, and was finally acted upon and rejected by them, as appears by a copy of their report thereon. As the tract claimed by the petitioner contains less than 3,500 acres of land, and had been rejected by the register [ \* 84 ] and receiver acting as a board of commissioners, "the attorney contended that the court had no jurisdiction of the case.

At the trial, the counsel for the claimant offered in evidence a copy from the office of the keeper of public archives, of the original grant on which the claim is founded, to the receiving of which in evidence the attorney for the United States objected, alleging that the original grant itself should be procured, and its execution proved. This objection was overruled by the court, and the copy from the office of the keeper of the public archives, certified according to law, was admitted. The attorney for the United States excepted to this opinion.

It appears from the words of the grant, that the original was not in possession of the grantee. The decree, which constitutes the title, appears to be addressed to the officer of the government whose duty it was to keep the originals and to issue a copy. Its language, after granting in absolute property, is, "for the attainment of which let a certified copy of this petition and decree be issued to him from the secretary's office, in order that it may be to him in all events equivalent to a title in form." This copy is, in contemplation of law, an original.

It appears, too, from the opinion of the judge, "that by an express statute of the territory, copies are to be received in evidence." The judge added, that "where either party shall suggest that the original,

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in the office of the keeper of the public archives, is deemed necessary to be produced in court, on motion therefor a subpoena will be issued by order of the court to the said keeper to appear and produce the said original for examination."

The act of the 26th of May, 1824,<sup>1</sup> "enabling the claimants of lands within the limits of the State of Missouri and territory of Arkansas to institute proceedings to try the validity of their claims," in its 4th section, makes it the duty of "the keeper of any public records who may have possession of the records and evidence of the different tribunals which have been constituted by law for the adjustment of land titles in Missouri, as held by France, upon the application of any person or persons whose claims to lands have been rejected by such tribunals or either of them, or on the application of any person interested, \* or by the attorney of the [ \* 85 ] United States for the district of Missouri, to furnish copies of such evidence, certified under his official signature, with the seal of office thereto annexed, if there be a seal of office."

The act of the 23d of May, 1828,<sup>2</sup> supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida, declares in its 6th section, that certain claims to lands in Florida, which have not been decided and finally settled, "shall be received and adjudicated by the judge of the superior court of the district within which the land lies, upon the petition of the claimant, according to the forms, rules, regulations, conditions, restrictions, and limitations prescribed by (for) the district and claimants in the State of Missouri by act of congress approved May 26, 1824, entitled "an act enabling the claimants," &c.

The copies directed by the act of 1824, would, undoubtedly, have been receivable in evidence on the trial of claims to lands in Missouri. Every reason which could operate with congress for applying this rule of evidence to the courts of Missouri, operates with equal force for applying it to the courts of Florida; and a liberal construction of the act of May 23, 1828, admits of this application.

The 4th section of the act of May 26, 1830, "to provide for the final settlement of land claims in Florida," adopts, almost in words, the provision which has been cited from the 6th section of the act of May 23, 1828.

Whether these acts be or be not construed to authorize the admission of the copies offered in this cause; we think that, on general principles of law, a copy given by a public officer whose duty it is to keep the original, ought to be received in evidence.

<sup>1</sup> 4 Stats. at Large, 52.

<sup>2</sup> Ib. 284.

We are all satisfied that the opinion was perfectly correct, and that the copies ought to have been admitted.

We proceed then to examine the decree which was pronounced, confirming the title of the petitioner.

The general jurisdiction of the courts not extending to suits against the United States, the power of the superior court for the district of East Florida to act upon the claim of the petitioner, Percheman, in

the form in which it was presented, must be specially conferred by statute. It is conferred, if at all, by \*the act of [ \* 86 ] the 26th of May, 1830, entitled "An act to provide for the final settlement of land claims in Florida." The 4th section of that act enacts "that all the remaining claims which have been presented according to law, and not finally acted upon, shall be adjudicated and finally settled upon the same conditions, restrictions, and limitations, in every respect, as are prescribed by the act of congress approved the 23d of May, 1828, entitled "An act supplementary," &c.

The claim of the petitioner, it is admitted, "had been presented according to law;" but the attorney for the United States contended, that "it had been finally acted upon." The jurisdiction of the court depends on the correctness of the allegation. In support of it, the attorney for the United States produced an extract from the books of the register and receiver acting as commissioners to ascertain claims and titles to land in East Florida, from which it appears that this claim was presented by Francis P. Sanchez, assignee of the petitioner, on which the following entry was made: "In the memorial of the claimant to this board, he speaks of a survey made by authority in 1819. If this had been produced, it would have furnished some support for the certificate of Aguilar. As it is, we reject the claim."

Is this rejection a final action on the claim, in the sense in which those words are used in the act of the 26th of May, 1830?

In pursuing this inquiry, in endeavoring to ascertain the intention of congress, it may not be improper to review the acts which have passed on the subject, in connection with the actual situation of the persons to whom those acts relate.

Florida was a colony of Spain, the acquisition of which by the United States was extremely desirable. It was ceded by a treaty concluded between the two powers at Washington, on the 22d day of February, 1819.

The 2d article contains the cession, and enumerates its objects. The 8th contains stipulations respecting the titles to lands in ceded territory.

It may not be unworthy of remark, that it is very unusual, even

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in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, \* would [ \* 87 ] be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change. It would have remained the same as under the ancient sovereign. The language of the 2d article conforms to this general principle. "His catholic majesty cedes to the United States in full property and sovereignty, all the territories which belong to him situated to the eastward of the Mississippi, by the name of East and West Florida." A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes that only which belonged to him. Lands he had previously granted, were not his to cede. Neither party could so understand the cession. Neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilized world. The cession of a territory by its name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property. If this could be doubted, the doubt would be removed by the particular enumeration which follows: "The adjacent islands dependent on said provinces, all public lots and squares, vacant lands, public edifices, fortifications, barracks, and other buildings which are not private property, archives and documents which relate directly to the property and sovereignty of the said provinces, are included in this article."

This special enumeration could not have been made, had the first clause of the article been supposed to pass not only the objects thus enumerated, but private property also. The grant of \* buildings could not have been limited by the words "which [ \* 88 ] are not private property," had private property been included in the cession of the territory.

This state of things ought to be kept in view when we construe

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the 8th article of the treaty, and the acts which have been passed by congress for the ascertainment and adjustment of titles acquired under the Spanish government. That article in the English part of it is in these words: "All the grants of land made before the 24th of January, 1818, by his catholic majesty, or by his lawful authorities, in the said territories ceded by his Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his catholic majesty."

This article is apparently introduced on the part of Spain, and must be intended to stipulate expressly for that security to private property which the laws and usages of nations would, without express stipulation, have conferred. No construction which would impair that security further than its positive words require, would seem to be admissible. Without it, the titles of individuals would remain as valid under the new government as they were under the old; and those titles, so far at least as they were consummate, might be asserted in the courts of the United States, independently of this article.

The treaty was drawn up in the Spanish as well as in the English language. Both are originals, and were unquestionably intended by the parties to be identical. The Spanish has been translated, and we now understand that the article, as expressed in that language, is, that the grants "shall remain ratified and confirmed to the persons in possession of them, to the same extent, &c.,"—thus conforming exactly to the universally received doctrine of the law of nations. If the English and the Spanish parts can, without violence, be made to agree, that construction which establishes this conformity ought to prevail. If, as we think must be admitted, the security of private property was intended by the parties; if this security would have been complete without the article, the United States could have no motive

[ \* 89.] for insisting on the interposition of government in order to give validity to titles which, according \*to the usages of the civilized world, were already valid. No violence is done to the language of the treaty by a construction which conforms the English and Spanish to each other. Although the words "shall be ratified and confirmed," are properly the words of contract, stipulating for some future legislative act; they are not necessarily so. They may import that they "shall be ratified and confirmed" by force of the instrument itself. When we observe that in the counterpart of the same treaty, executed at the same time by the same parties, they are used in this sense, we think the construction proper, if not unavoidable.

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In the case of *Foster v. Neilson*, 2 Pet. 253, this court considered these words as importing contract. The Spanish part of the treaty was not then brought to our view, and we then supposed that there was no variance between them. We did not suppose that there was even a formal difference of expression in the same instrument, drawn up in the language of each party. Had this circumstance been known, we believe it would have produced the construction which we now give to the article.

This understanding of the article must enter into our construction of the acts of congress on the subject.

The United States had acquired a territory containing near 30,000,000 of acres, of which about 3,000,000 had probably been granted to individuals. The demands of the treasury, and the settlement of the territory, required that the vacant lands should be brought into the market; for which purpose the operations of the land-office were to be extended into Florida. The necessity of distinguishing the vacant from the appropriated lands was obvious; and this could be effected only by adopting means to search out and ascertain pre-existing titles. This seems to have been the object of the first legislation of congress.

On the 8th of May, 1822,<sup>1</sup> an act was passed, "for ascertaining claims and titles to land within the territory of Florida."

The 1st section directs the appointment of commissioners for the purpose of ascertaining the claims and titles to lands within the territory of Florida, as acquired by the treaty of the 22d of February, 1819.

\* It would seem, from the title of the act and from this [ \* 90 ] declaratory section, that the object for which these commissioners were appointed, was the ascertainment of these claims and titles. That they constituted a board of inquiry, not a court exercising judicial power and deciding finally on titles. By the act "for the establishment of a territorial government in Florida,"<sup>2</sup> previously passed at the same session, superior courts had been established in East and West Florida, whose jurisdiction extended to the trial of civil causes between individuals. These commissioners seem to have been appointed for the special purpose of procuring promptly for congress that information which was required for the immediate operations of the land-office. In pursuance of this idea, the 2d section directs that all the proceedings of the commissioners, the claims admitted, with those rejected, and the reason of their admission and rejection, be recorded in a well-bound book, and forwarded to the

<sup>1</sup> 3 Stats. at Large, 709.

<sup>2</sup> Ib. 654

secretary of the treasury to be submitted to congress. To this desire for immediate information we must ascribe the short duration of the board. Their session for East Florida was to terminate on the last of June in the succeeding year; but any claims not filed previous to the 31st of May in that year, to be void and of none effect.

These provisions show the solicitude of congress to obtain, with the utmost celerity, that information which ought to be preliminary to the sale of the public lands. The provision, that claims not filed with the commissioners previous to the 30th of June, 1823, should be void, can mean only that they should be held so by the commissioners, and not allowed by them. Their power should not extend to claims filed afterwards. It is impossible to suppose that congress intended to forfeit real titles not exhibited to their commissioners within so short a period.

The principal object of this act is further illustrated by the 6th section, which directed the appointment of a surveyor who should survey the country; taking care to have surveyed and marked, and laid down upon a general plan to be kept in his office, the metes and bounds of the claims admitted.

The 4th section might seem, in its language, to invest the commissioners with judicial powers, and to enable them to decide [ \* 91 ] \*as a court in the first instance, for or against the title in cases brought before them; and to make such decision final if approved by congress. It directs that the "said commissioners shall proceed to examine and determine on the validity of the said patents," &c. If, however, the preceding part of the section, to which this clause refers, be considered, we shall find in it almost conclusive reason for the opinion that the examination and determination they were to make, had relation to the purpose of the act, to the purpose of quieting speedily those whose titles were free from objection, and procuring that information which was necessary for the safe operation of the land-office; not for the ultimate decision, which, if adverse, should bind the proprietor. The part of the section describing the claims into the validity of which the commissioners were to examine, and on which they were to determine, enacts that every person, &c., claiming title to lands under any patent, &c., "which were valid under the Spanish government, or by the law of nations, and which are not rejected by the treaty ceding the territory of East and West Florida to the United States, shall file, &c."

Is it possible that congress could design to submit the validity of titles, which were "valid under the Spanish government, or by the law of nations," to the determination of these commissioners?

It was necessary to ascertain these claims, and to ascertain their

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location, not to decide finally upon them. The powers to be exercised by the commissioners under these words ought, therefore, to be limited to the object and purpose of the act.

The 5th section, in its terms, enables them only to examine into and confirm the claims before them. They were authorized to confirm those claims only which did not exceed 1,000 acres.

From this review of the original act, it results, we think, that the object for which this board of commissioners was appointed, was to examine into and report to congress such claims as ought to be confirmed; and their refusal to report a claim for confirmation, whether expressed by the term "rejected," or in any other manner, is not to be considered as a final judicial <sup>\*</sup>decision on the [ \*92 ] claim, binding the title of the party, but as a rejection for the purposes of the act.

This idea is strongly supported by a consideration of the manner in which the commissioners proceeded, and by an examination of the proceedings themselves, as exhibited in the reports to congress.

The commissioners do not appear to have proceeded with open doors, deriving aid from the argument of counsel, as is the usage of a judicial tribunal, deciding finally on the rights of parties; but to have pursued their inquiries like a board of commissioners, making those preliminary inquiries which would enable the government to open its land-office; whose inquiries would enable the government to ascertain the great bulk of titles which were to be confirmed, not to decide ultimately on the titles which those who had become American citizens legally possessed.

On the 3d of March, 1823,<sup>1</sup> congress passed a supplementary act, which also provided for the survey and disposal of the public lands in East Florida. It authorizes the appointment of a separate board of commissioners for East Florida, and empowers the commissioners to continue their sessions until the second Monday in the succeeding February, when they were to return their proceedings to the secretary of the treasury.

This act dispenses with the necessity of deducing title from the original grantee, and authorizes the commissioners to decide on the validity of all claims derived from the Spanish government in favor of actual settlers, where the quantity claimed does not exceed 3,500 acres. The act "to extend the time for the settlement of private land claims in the territory of Florida," passed on the 28th of February, 1824,<sup>2</sup> enacts that no person shall be deemed an actual settler,

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<sup>1</sup> 8 Stats. at Large, 754.

<sup>2</sup> 4 Ib. 6.

"unless such person, or those under whom he claims title, shall have been in the cultivation or occupation of the land, at and before the period of the cession."

On the 8th of February, 1827,<sup>1</sup> congress passed an act extending the time for receiving private land claims in Florida, and directing them to be filed on or before the 1st day of the following November [ \* 93 ] with the register and receiver of the district; "whose duty it shall be to report the same with their decision thereon," on or before the 1st day of January, 1828, to be laid before congress at the next session.

These acts are not understood to vary the powers and duties of the tribunals authorized to settle and confirm these private land claims.

On the 23d of May, 1828, an act passed, supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida.

This act continues the power of the register and receiver till the first Monday in the following December, when they are to make a final report; after which it shall not be lawful for any of the claimants to exhibit any further evidence in support of their claims.

The 6th section of this act transfers to the court all claims "which shall not be decided and finally settled under the foregoing provisions of this act, containing a greater quantity of land than the commissioners were authorized to decide, and above the amount confirmed by this act, and which have not been reported as antedated or forged," and declares that they "shall be received and adjudicated by the judge of the district court in which the land lies, upon the petition of the claimant, according to the forms," &c., "prescribed," &c., by act of congress approved May 26, 1824, entitled "An act enabling the claimants to land within the limits of the State of Missouri and territory of Arkansas to institute proceedings," &c. A proviso excepts from the jurisdiction of the court any claim annulled by the treaty or decree of ratification by the king of Spain, or any claim not presented to the commissioners or register and receiver.

The 13th section enacts that the decrees which may be rendered by the district or supreme court "shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons."

In all the acts passed upon this subject previous to that of May, 1830, the decisions of the commissioners, or of the register and

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receiver acting as commissioners, have been confirmed. Whether these acts affirm those decisions by which claims are rejected, as well as those by which they are recommended for confirmation, admits of some doubt; whether a rejection \* amounts to [ \* 94 ] more than a refusal to recommend for confirmation, may be a subject for serious inquiry; however this may be, we think it can admit of no doubt that the decision of the commissioners was conclusive in no case until confirmed by an act of congress. The language of these acts, and among others that of the act of 1828, would indicate that the mind of congress was directed solely to the confirmation of claims, not to their annulment. The decision of this question is not necessary to this case. The claim of the petitioner was not contained in any one of the reports which have been stated.

On the 26th of May, 1830, congress passed "an act to provide for the final settlement of land claims in Florida." This act contains the action of congress on the report of the 14th of January, 1830, which contains the rejection of the claim in question. The 1st section confirms all the claims and titles to land filed before the register and receiver of the land-office under one league square, which have been decided and recommended for confirmation. The 2d section confirms all the conflicting Spanish claims, recommended for confirmation as valid titles.

The 3d confirms certain claims derived from the former British government, and which have been recommended for confirmation

The 4th enacts "that all remaining claims which have been presented according to law, and not finally acted upon, shall be adjudicated and finally settled upon the same conditions," &c.

It is apparent that no claim was finally acted upon until it had been acted upon by congress; and it is equally apparent that the action of congress on the report containing this claim, is confined to the confirmation of those titles which were recommended for confirmation. Congress has not passed on those which were rejected. They were, of consequence, expressly submitted to the court.

The decision of the register and receiver could not be conclusive for another reason. Their power to decide did not extend to claims exceeding 1,000 acres, unless the claimant was an actual settler; and it is not pretended that either the petitioner, or Francisco de Sanchez, his assignee, \* was a settler, as described in the 3d [ \* 95 ] section of the act of 1824.

The rejection of this claim, then, by the register and receiver did not withdraw it from the jurisdiction of the court, nor constitute any bar to a judgment on the case according to its merits.

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An objection not noticed in the decree of the territorial court, has been urged by the attorney-general, and is entitled to serious consideration. The governor, it is said, was empowered by the royal order on which the grant professes to be founded, to allow to each person the quantity of land established, by regulation in the province, agreeably to the number of persons composing each family.

The presumption arising from the grant itself, of a right to make it, is not directly controverted; but the attorney insists that the documents themselves prove that the governor has exceeded his authority.

Papers translated from a foreign language, respecting the transactions of foreign officers, with whose powers and authorities we are not well acquainted, containing uncertain and incomplete references to things well understood by the parties, but not understood by the court, should be carefully examined before we pronounce that an officer, holding a high place of trust and confidence, has exceeded his authority.

The objection rests on the assumption that the grant to the petitioner is founded entirely on the allowance made in the royal order of the 29th of March, 1815, at the request of the governor of East Florida; and the petition to the governor undoubtedly affords strong ground for this assumption; but we are far from thinking it conclusive. The petitioner says: "that, in virtue of the bounty in lands, which, pursuant to his royal order of the 29th of March, of the present year, the king grants to the military who were of this place in the time of the invasion which took place in the years 1812 and 1813, and your petitioner considering himself as being comprehended in the said sovereign resolution, as it is proved by the annexed certificates of his lordship brigadier Don Sebastian Kindelan, and by that which your lordship thought proper to provide here-  
[ \* 96 ] with, which certificates express the merits and services rendered by your petitioner at the time of the siege, in consequence of which said bounties were granted to those who deserved them;" "therefore he most respectfully supplicates your lordship to grant him 2,000 acres of land in the place," &c. The governor granted the 2,000 acres of land for which the petitioner prays.

The attorney contends that the royal order of the 29th of March, 1815, empowered the governor to grant so much land only, as, according to the established rules, was allowed to each settler. This did not exceed 100 acres to the head of a family, and a smaller portion for each member of it.

The extraordinary facts that an application for 2,000 acres should

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be founded on an express power to grant only 100; that this application should be accompanied by no explanation whatever, and that the grant should be made without hesitation, as an ordinary exercise of legitimate authority, are circumstances well calculated to excite some doubt whether the real character of the transaction is understood, and to suggest the propriety of further examination.

The royal order is founded on a letter from Governor Kindelan to the Captain-general of Cuba, in which he recommends the militia as worthy the gifts to which the supreme governor may think them entitled: "taking the liberty of recommending the granting of some which may be as follows; to each officer who has been in actual service in said militia, a royal commission for each grade he may obtain as provincial, and to the soldiers a certain quantity of land as established by regulation in this province, agreeably to the number of persons composing each family, and which gifts can also be exclusively made to the married officers and soldiers of the said 3d battalion of Cuba."

The words "and which gifts," &c. in the concluding part of the sentence, would seem to refer to that part which asks lands for the soldiers of the militia; and yet it is unusual in land bounties for military service, to bestow the same quantity on the officers as on the soldiers.

But be this as it may, the application of Governor Kindelan is confined to the privates who served in the militia, and to the married officers and soldiers of the 3d battalion of Cuba.

\* The petitioner was in neither of these corps. He was an [ \* 97 ] ensign of the corps of dragoons.

The royal order alluded to, is contained in a letter of the 29th of March, 1815, from the minister of the Indies; who, after stating the application in favor of the militia, and the third regiment of Cuba, adds: "At the same time that his Majesty approves said gifts, he desires that your excellency will inform him as to the reward which the commandant of the third battalion of Cuba, Don Juan José de Estrada, who acted as governor *pro tem.* at the commencement of the rebellion, the officers of artillery, Don Ignacia Salus, Don Manuel Paulin, and of dragoons, Don Juan Percheman, are entitled to, as mentioned by the governor in his official letter. By royal order, I communicate the same to his excellency for your information and compliance therewith, inclosing the royal commissions of local militia, according to the note forwarded by your excellency."

The governor adds: "I forward you a copy of the same, inclosing also the documents above mentioned, that you may give their cor-

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respondent direction, with the intention, by the first opportunity, of informing his Majesty of what I consider just as to the remuneration before mentioned."

It appears, then, that the part of the royal order which is supposed to limit this power of the governor to grants of 100 acres, does not comprehend the petitioner; that he is mentioned in that order as a person entitled to the royal bounty, the extent of which is not fixed, and respecting which the governor intended to inform his Majesty.

The royal order, then, is referred to in the petition, as showing the favorable intentions of the crown towards the petitioner; not as ascertaining limits applying to him, which the governor could not transcend.

The petition also refers to certificates granted by General Kindelan, and by the governor himself, expressing his merits and services during the siege. These could have no influence if the amount of the grant was fixed.

In his grant annexed to the petition, the governor says: "Whereas this officer, the party interested by the two certificates inclosed, has proved the services which he rendered in defence of [ \*98 ] \*this province, and in consideration also of what is provided in the royal order of the 29th of March last past, which he cites, I do grant him," &c.

Military service, then, is the foundation of the grant, and the royal order is referred to only as showing that the favorable attention of the king had been directed to the petitioner.

The record furnishes other reasons for the opinion that the power of the governor was not so limited in this case, as is supposed by the attorney for the United States.

The objection does not appear to have been made in the territorial court, where the subject must have been understood. It was neither raised by the attorney for the United States, nor noticed by the court.

The register and receiver, before whom the claim was laid by Sanchez, the assignee of the present petitioner, did not reject it because the governor had exceeded his power in making it, but because the survey was not exhibited. "If this," (the survey,) say the register and receiver, "had been produced, it would have furnished some support for the certificate of Aguilar. As it is, we reject the claim."

It may be added that other claims, under the same royal order for the same quantity of land, have been admitted by the receiver and register, and have been confirmed by congress.

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*Minor v. Tillotson. 7 P.*

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We do not think the testimony proves that the governor has transcended his power.

The court does not enter into the inquiry, whether the title has been conveyed to Sanchez or remains in Perchman. That is a question in which the United States can feel no interest, and which is not to be decided in this cause. It was very truly observed by the territorial court, that this objection "is founded altogether on a suggestion of a private adverse claim;" but adverse claims under the law giving jurisdiction to the court, are not to be decided or investigated. The point has not been made in this court.

The decree is affirmed.

9 P. 117, 483, 711; 12 P. 410, 511, 657; 14 P. 834, 353; 15 P. 215, 226, 819; 16 P. 153, 228; 9 H. 421; 11 H. 68; 17 H. 426; 20 H. 8, 176; 21 H. 170; 24 H. 175; 1 B. 839; 5 Wal. 211; 11 W. 817, 640; 16 W. 484; 20 W. 469; 21 W. 527; 11 O. 706.

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**JOHN MINOR, Plaintiff in Error, v. SHURBAL TILLOTSON.**

7 P. 99.

Where an original deed should have been in the possession of the plaintiff's grantor, and he was applied to and furnished a bundle of papers which he said were all he had relating to the lands, and the deed in question was not found in the bundle, and there were no circumstances of suspicion, *Held*, that it was not necessary to produce the grantor as a witness to prove the loss of the deed, that due diligence had been used to obtain it, and secondary evidence was admissible.

THE case is stated in the opinion of the court.

*Clay*, for the plaintiff.

*Webster*, contra.

**THOMPSON, J.**, delivered the opinion of the court.

On the trial of this cause, in the district court of the United States for the eastern district of Louisiana, a bill of exceptions was taken to the ruling of the court in rejecting certain evidence offered by the plaintiff in support of the title set up by him, and the case is brought here by writ of error.

The bill of exceptions states that the plaintiff, having set up title to the premises in dispute by virtue of a sale from general

\* Wade Hampton, dated the 5th of April, 1819, then offered [ \*100 ] in evidence another paper purporting to be a copy of the grant, under which said Hampton claimed, which copy had been duly presented and registered by the land commissioners of this district, in the year 1806, having first proved that many of the ordinances of the Spanish governors of Louisiana had been deposited in the

notarial office of Pedro Pedescloux, the notary, who certified the said paper under his hand and notarial seal, and who is now dead ; and also having first proved that the original grant was once in the possession of General Wade Hampton, but that he had, by his attorney, applied to said Wade Hampton for it, who gave him a bundle of papers, saying, they were all the titles of his Houmas lands in his possession, but which bundle did not contain the original of the paper sought after ; the plaintiff also offered in evidence the translation of said document, published by congress in the book called the Land Laws of the United States, pp. 954, 955, 956, published in the year 1828. These papers were objected to on the ground that they were not the best evidence, and that due diligence had not been used to procure the originals. And the court sustained the objection.

The document offered and rejected by the court, is to be considered as secondary evidence ; and there can be no doubt that the plaintiff was bound to account for the non-production of the original. This is a document which the law does not presume to be in the possession of the plaintiff; it is the grant under which Wade Hampton claimed ; a small part of which only was in question in this suit. The presumption of law therefore is, that the original deed was in the possession of Wade Hampton, and the plaintiff could not be bound to search for it elsewhere ; there being no law in Louisiana requiring deeds to be recorded. And it was proved, as matter of fact, that it was once in his possession ; at what time, however, is not stated ; and the question is, whether such search was made for it as to justify the admission of secondary evidence. The rules of evidence are adopted for practical purposes in the administration of justice ; and although it is laid down in the books as a general rule,

that the best evidence the nature of the case will admit of,  
[ \* 101 ] must be given ; yet it is not understood \*that this rule

requires the strongest possible assurance of the matter in question. The extent to which the rule is to be pushed in a case like the present, is governed in some measure by circumstances. If any suspicion hangs over the instrument, or that it is designedly withheld, a more rigid inquiry should be made into the reasons for its non-production. But when there is no such suspicion, all that ought to be required is reasonable diligence to obtain the original. Has that been shown in this case ? The exception states, that it was proved to have been in the possession of Wade Hampton, and that on application to him, by the plaintiff's attorney, for it, he gave him a bundle of papers, saying, they were all the titles to his Houmas lands (the premises in question being a part of that tract) ; but which bundle, on examination, did not contain the original deed in

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question. There was no other place to which the law pointed where search could be made; and nothing more could be required, unless it was necessary to have the oath of Wade Hampton that the deed was not in his possession. But this we do not think, under the circumstances of this case, was necessary. There do not appear any grounds for supposing the deed was designedly withheld; and the circumstances under which the search was made, were equivalent to the witness's having had free access to all Wade Hampton's papers, and proving that the deed could not be found among them. The examination was made by the witness under all the advantages and prospect of finding the deed that could have been afforded to Hampton himself. He was, for this purpose, in the possession of all his papers; and not finding it, the inference was very strong that it was lost. And the antiquity of the deed, being dated in the year 1777, rendered its loss the more probable.

The case of *Caufman v. Congregation of Cedar Spring*, 6 Binney, 59, decided in the supreme court of Pennsylvania, goes very fully to establish that it was not necessary to have the testimony of Wade Hampton, under the circumstances of this case. In that case a written agreement was placed in the hands of a common friend, who, upon his removal to another place, had put the paper into the hands of his father, who died. After proofs of these facts, a witness swore that, \*after the father's death, he, together with [ \* 102 ] the son-in-law, to whom all his papers came, made diligent search among the father's papers, but could not find the writing. It was held that this was sufficient proof of the loss to lay the foundation for proving the contents of the paper, without the oath of the son-in-law himself, as to the search and not finding the paper.

We think the proof of the loss of the original deed was sufficient to let in the secondary evidence. We forbear, however, expressing any opinion upon the legal effect and operation of that deed.

The judgment of the court below must be reversed, and the cause sent back with directions to award a *venire de novo*.

There were several other exceptions taken to the ruling of the court, in relation to the admission of testimony, which we do not notice. They are so imperfectly stated, that it is difficult to understand what the real point of objection is; and no opinion can be expressed that will aid the court below on another trial.

Judgment reversed.

24 H. 179.

WILLIAM S. NICHOLS, Plaintiff in Error, *v.* SAMUEL J. FEARSON *et al.*

7 P. 103.

If a note valid in its inception, and on which the payee could have an action against the maker, be sold by the indorser at a greater rate of discount than 6 per cent. per annum, the indorsee may maintain an action against the indorser; whether he can recover more than the consideration paid was not decided.

ERROR to the circuit court for the District of Columbia.

The case is stated in the opinion of the court.

*Key*, for the plaintiff.

*Coxe*, contrà.

[ \* 105 ] \*JOHNSON, J., delivered the opinion of the court.

This was an action by the indorsee against the indorser of a promissory note, in which the plaintiff here was plaintiff in the court below. It comes up upon exceptions taken to certain instructions given at the instance of the defendant, and to the refusal of other instructions prayed for by the plaintiff.

On the motion of the defendants, the court instructed the jury, "that if they believed, from the evidence, that the plaintiff received the note in question from the defendants, with their indorsement

upon it, and without any understanding that the defendants [ \* 106 ] were not to be responsible upon their indorsement," "at a discount beyond the legal rate of interest, then the transaction was usurious, and he could not recover.

The plaintiff then moved the court to instruct the jury to this effect: "that, if they believed the evidence made out a case in which there was no loan contemplated, nor any evasion of the laws against usury, but simply a sale of the note in question, then the transaction was not usurious, and the plaintiff was entitled to recover," which instruction the court refused.

The case makes out the note to have been a *bona fide* business transaction, not suspected of usury in its origin, or made up for the purpose of raising money in the market; and the decision of the court below, of course, affirms this proposition, "that in the sale of such a note, for a sum so much less than that on its face, as will exhibit a discount beyond the legal rate of interest, the guarantee or indorsement of the note, without a stipulation against the indorser's liability, makes out a case of usury; that it is, *per se*, an usurious contract between the indorsee and indorser; and no action can be maintained upon it against the indorser. And since the rule is uni-

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versal, that there can be no usury where there is no loan, it follows, that their decision implies the affirmance of the proposition that such a guarantee or indorsement necessarily implies a loan.

It is necessary to bear in mind that we are not now called upon to consider a case occurring upon the transfer of a note which is, in its origin, a mere nominal contract, one on which, as the test is very properly established in the New York courts, no cause of action arose between the original parties. 15 Johns. 44, 55. The present is a case of greater difficulty; for the principle affirmed in the decision under review, operates indirectly upon a contract not affected by usury; since by leaving the possession of the note in the indorsee, who has no cause of action, and the cause of action, if anywhere, in the indorser, who has parted with the possession of the note; it virtually discharges the promisor from liability, although his contract, in its inception, may have been wholly unimpeachable. Yet the rule of law is everywhere acknowledged, that a contract, free from usury in its inception, shall not be invalidated by any subsequent usurious transactions upon it.

\* It will hardly be contended that, although the indorse- [ \* 107 ] ment gave no cause of action against the indorser, yet it did operate to give a right of action against the maker of the note. The statute declares an usurious contract to be invalid to all intents and purposes whatever; a valid indorsement is a contract as well of transfer as of provisional liability; and if invalid to the one purpose, it must be equally so to the other.

The courts of New York have got over these difficulties by adjudicating, that whenever the note or bill, in its inception, was a real transaction, so that the payee or promisor might at maturity maintain a suit upon it, a transfer by indorsement on a discount, though beyond the legal rate of interest, shall be regarded as a sale of the note or bill, and a valid and legal transaction. But not so where the paper, in its origin, was only a nominal negotiation. Such is the result of the decisions in *Jones v. Haik*, 2 Johns. 60; *Wilkie v. Roosevelt*, 3 Johns. 66; and *Munn v. The Commission Company*, 15 Johns. 44.

It has been argued that the Massachusetts courts maintain the contrary doctrine. But the cases cited will not be found sufficient to bear out the argument. The case of *Churchill v. Suter*, 4 Mass. 156, was the case of a nominal contract, a note made to be sold in the market, as is admitted in the case stated; the point of usury was not argued; and the opinion expressed by the learned judge was, at best, but an *obiter dictum*. However, let that opinion be confined to the *res subjecta*, and there can be no reason for controverting it in this

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case. It was the case of a nominal sale, a loan with the disguise of a sale thrown over it.

The case of *Bridge et al. v. Hubbard*, 15 Mass. 96, was one of a different character, and decided in conformity with another class of cases. It was the case of the substitution of a new contract for a note given for usurious interest due upon previous transactions. The note passed into the hands of innocent indorsees, and the question was, whether it was affected with the taint of the original usury, or only with the want of consideration. And the majority of the court held it to be a security for a loan of money obtained upon [ \*108 ] usury, and therefore \*void in the hands of the present holders. This, of course, is not an adjudication in point.

The case of *Lloyd v. Keach*, 2 Conn. 175, cited from the adjudications of Connecticut, is in point; but it is an authority against the decision under review. The note was given in the course of business; and in a suit brought upon it by the indorsee against the drawer, the inferior court decided that the sale of such a note by the indorser on a discount exceeding the legal rate of interest, was rendered usurious by his indorsement and guarantee, and that the plea of usury was a good bar to a suit instituted against the drawer. But, on an appeal to the supreme court of errors, although there was a considerable diversity of opinion among the judges, a new trial was granted upon the ground that such a transaction was not, *per se*, usurious; but that its validity must depend upon the *bona fides* of the transaction, as being a pure, unaffected sale, or merely a color for a loan.

Upon a subject of such general mercantile interest, we must dispose of the question according to our own best judgment of the law. And it becomes necessary first to review some of our own decisions which have a bearing upon it.

The first was the case of *Levy v. Gadsby*, which was an action by indorsee against indorser, upon a note which would seem to have originated in a real transaction, and the defence was usury. But the distinction between that case and the present is, that the defence was not set up in that case upon any interest or discount taken for the transfer of the note, but upon an usurious negotiation for a loan or forbearance with reference to a preexisting debt, in consideration of which Gadsby's note was indorsed to the plaintiff; and thus came within the description of "an assurance for forbearance," which is made void by the statute, as well as the contract secured; (3 Cranch. 180;) and the usury there was proved, not inferred from the guarantee by indorsement.

The case of *Gaither v. The Farmers and Mechanics Bank*, 1 Pet. 37, was one precisely of the same character with that of *Levy v.*

Gadsby, except that the suit was instituted by the indorsee against the drawer; the cause was decided upon the \*in- [ \*109 ] validity of the indorsement to transfer the right of action to that indorsee, not to any other holder, the plaintiff being the party to the usury. An usurious loan had been negotiated, and Gaither's note to Corcoran, the borrower on usury, indorsed in blank by Corcoran, and left with the plaintiff to collect, in payment of the money borrowed. It was therefore a clear case of an assurance given for money borrowed on usury; and in no way could a court permit the borrower to avail himself of the indorsement without violating the statute.

We recollect no other case in which this court has been called upon to consider the effect of usury upon the contracts of parties to negotiable paper. We are, therefore, uncommitted upon the question now before us, and free to decide it, as well upon reason and principle, as upon what appears to us to be the weight of authority.

There are two cardinal rules in the doctrine of usury which we think must be regarded as the common place to which all reasoning and adjudication upon the subject should be referred. The first is, that to constitute usury there must be a loan in contemplation by the parties; and the second, that a contract, which, in its inception, is unaffected by usury, can never be invalidated by any subsequent usurious transaction.

It is true with regard to the first of these canons, that there are cases which necessarily import a loan, and no disguise, no affectation of sale or barter can devest them of that character; such, for instance, as a man's selling his own bond or note, executed, say in blank, and when these cases occur, the law puts the stigma upon them without further inquiry. The instrument having had no virtual existence until the loan or sale was negotiated, could in nowise be regarded as a transfer of property. But he who sells his lands or stock, and takes a note in payment, holds in his hands the representative of property, an entity to which the improvements of society have attached all the rights and characteristics, in equity at least, which were the acknowledged attributes of the property for which it was received. A promise to return the money borrowed is, indeed, one among the ordinary indications of a loan; and upon the idea that the contract of an indorser could not be distinguished from a general engagement to repay, have the \*decisions in the [ \*110 ] Connecticut case and in the court below, in the case at bar, been rendered. But the grounds of distinction are material, for the contract between indorser and indorsee is, at best, but a conditional or provisional contract; the indorsement of a business note

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produces a real transfer of interest, and the indorsement may well be regarded in the light of a guarantee against the insolvency of the promisor. In the case of an assignment of a bond, with a guarantee against insolvency which every assignment in Virginia and Kentucky imports; it has been adjudged, in both those States, that usury does not avoid the effect of the assignment. That the transfer of the right of action on the bond is complete, and if valid for one purpose, it is presumed it must be so to every one. *Littell v. Hord, Hardin, 81; Hansborough v. Baylor, 2 Munf. 36.*

These observations are made to show that the indorsement of this note did not necessarily import a loan. But we are not to be understood as intimating that, if in a treaty for, or conclusion of a loan, the indorsement be expressly stipulated for as security for repayment, the contract being usurious may not invalidate the indorsement under the character of a security or assurance. Such was the decision in Gaither's case in this court, and these remarks only go to show that an indorsement, without a stipulation against ultimate liability, does not necessarily imply a case of usury.

And in this we are sustained by the argument *ab inconvenienti*, or *ducitur in absurdum*, which would result from the contrary doctrine, if considered with relation to the second canon or general rule respecting usury, as before laid down, to wit:—

That a contract free from usurious taint in its inception, is not to be invalidated by any subsequent usurious transaction; since, as has been shown, by converting a sale on a discount into a loan on usury, and thus rendering null and void the act of indorsing it, a contract wholly innocent in its origin, and binding and valid upon every legal principle, is rendered, at least, valueless in the hands of the otherwise legal holder; and a party to whom the provisions of the act against usury could never have been intended to extend, would be discharged of a debt which he justly owes to some one.

[ \*111 ] \* Such inconsistencies are not to be lightly incurred; it is enough to submit to them when they become unavoidable, but it is easy to assign other and adequate motives for selling a note and then indorsing it, without imputing to the transaction the negotiation of a loan; and it is enough if the imputation be not unavoidable. The acts against usury were intended to protect the needy; but the holder of a note may be wealthy, may be the lender, not the borrower of money, and yet find an adequate motive both for selling a note and guaranteeing it. Suppose the debtor absconds, or removes to the Arkansas or the Oregon, the very wealth of the holder may make it no object to follow him or prosecute a suit against him; his freedom, from necessity, may be the holder's motive

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for parting with the note to another at a moderate sacrifice; his indorsing it will diminish that sacrifice, and, although removing, the debtor may be wealthy, and the inducement for the indorsement may be the conviction that the debt is safe — that he will never have to repay what he has received. There could be inferred no treaty for a loan from such a transaction, nor any device to evade the statute. It is a plain contract of bargain and sale, with a warranty of the soundness of the property.

We have not had leisure fully to explore the decisions of the States on the question, but, as far as we have gone, the great weight of authority is certainly in favor of the validity of the contract under review.

The courts of Kentucky have recognized the validity of such a transfer in a case of admitted usury between the assignor and assignee of a bond. Littell v. Hord, Hardin, 82. The courts of Virginia have given validity both to the assignment of a bond and the indorsement of a note, expressly created for sale, and sold at an usurious discount, where there was no proof of a negotiation for a loan. 2 Munf. 36, & 5 Rand. 33. Those of Maryland also have lent their sanction to the doctrine in the case of Kenner v. Herd, 2 Hen. & Munf.; and in South Carolina such has long been the established doctrine. 1 Bay. 456; 3 M'Cord, 365.

On the question whether the plaintiff may recover the whole amount of the note, or only according to the value of the consideration paid, it will be observed we are not called [ \*112 ] upon to express an opinion.

Upon the whole, we are of opinion that, upon both reason and authority, the law is in favor of the plaintiff; and that the court below erred, both in the instructions given for the defendants, and in refusing those prayed for by the plaintiff.

Judgment reversed, and a *venire de novo* awarded.

18 P. 345; 18 W. 386.

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JAMES S. DOUGLASS, and others, Plaintiffs in Error, v. REYNOLDS,  
BYRNE AND COMPANY, Defendants in Error.

7 P. 113.

An action for money lent, or had and received, cannot be maintained on a collateral promise.

In an action upon a guarantee, the plaintiff may show that he relied and acted on it in making advances, or giving credit.

A letter stating that, "our friend, C. H., to assist him in business, may require your aid from time to time, either by acceptance or indorsement of his paper, or advances in cash. In order to save you from harm in doing so, we do hereby bind ourselves, severally and

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jointly, to be responsible to you at any time, for a sum not exceeding \$8,000, should the said C. H. fail so to do," is a continuing guarantee.

The words of a guaranteee are to be taken as strongly against a guarantor as their sense will admit.

A party giving a guarantee is entitled to know whether it is accepted within a reasonable time after its acceptance.

Under a continuing guarantee, notice need not be given to the guarantor of each credit given, or liability incurred; but when the transactions under the guarantee are all closed, notice should be given, within a reasonable time, of the amount for which the guarantors are held responsible; and, also within a reasonable time, demand should be made on the debtor, and notice of his default given to the guarantor.

A creditor receiving notes of a third person as a conditional payment, is bound to use due diligence to collect them, and his laches will render the payment absolute.

THE case is stated in the opinion of the court.

*Jones*, for the plaintiffs.

*Taney*, (attorney-general,) *contrà*.

[ \* 117 ] \* STORY J., delivered the opinion of the court.

This case comes before us upon a writ of error to a judgment of the district court of the district of Mississippi, in which the plaintiffs in error are defendants in the court below.

The original action is founded upon a guarantee, given by Douglass and others in favor of one Chester Haring, by the following letter:—

"Port Gibson, December, 1807.

"Messrs. REYNOLDS, BYRNE, AND CO.

"Gentlemen: Our friend, Mr. Chester Haring, to assist him in business, may require your aid from time to time, either by acceptance or indorsement of his paper, or advances in cash. In order to save you from harm by so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you at any time for a sum not exceeding \$8,000, should the said Chester Haring fail to do so.

"Your obedient servants,

"JAMES S. DOUGLASS.

"THOMAS G. SINGLETON.

"THOMAS GOING."

The declaration contains two counts. The first alleges that, upon the faith of the letter, the original plaintiffs accepted and indorsed drafts or paper of Haring to the amount of \$8,000, which [ \* 118 ] they were obliged to pay, and did pay at \*the maturity thereof; and of which they gave due notice to the defendants. The second count is for money lent, and money had and received. But this may be laid entirely out of the case, since it is very clear, that, upon a collateral undertaking of this sort, no such suit is maintainable.

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At the trial upon the general issue and the plea of payment, the plaintiffs, who are resident merchants at New Orleans, offered evidence to prove the payment of five promissory notes, dated on the 1st of May, 1829, payable to Daniel Greenleaf or order, and indorsed by him, namely: one note due on the 20th of November, 1829, for \$4,000; one due on the 20th of December, 1829, for \$4,500; one due on the 20th of January, 1830, for \$5,500; one due on the 20th of February, 1830, for \$5,500; and one due on the 20th of March, 1830, for \$5,500, in the whole amounting to \$25,000; and that the notes had been discounted with the plaintiffs' indorsement thereon, and were taken up by them at maturity.

It also appeared in evidence that soon after the letter of guarantee had been received, acceptance had been made of the drafts of Haring by the plaintiffs to the amount of \$8,000; and that other large transactions of debt and credit took place between them, upon which, on the 1st of May, 1829, there was a balance of principal of \$22,573.23, besides interest, due to the plaintiffs, and credits to a larger amount than \$8,000 had come into possession of the plaintiffs. And on that day the foregoing notes were received, and the following receipt written on the account containing the balance.

"Received, Port Gibson, May 1, 1829, in part and on account of the above account, and interest that may be due thereon, the following notes, to wit, (enumerating them,) amounting in all to \$25,000, which notes, when discounted, the proceeds to go to the credit of this account.

"REYNOLDS, BYRNE, AND CO".

There was a good deal of other evidence in the cause, but it does not seem necessary to state it at large, since no [ \* 119 ] part of it becomes important to a just understanding of the merits of the controversy, as it now stands before us.

In the progress of the trial, the depositions of several witnesses who were clerks in the counting-house of the plaintiffs were read, in which they stated that they knew that the letter of credit was considered by the plaintiffs as covering any balance due by Chester Haring to the plaintiffs, for advances from that time to the extent of \$8,000; and that advances were made, and moneys paid by them on account of Haring from the time of receiving the said letter of credit, predicated on the said letter always protecting the plaintiffs to the amount of \$8,000, whenever the said amount or less might be uncovered; and that it was considered in the said counting-house of the plaintiffs as a continuing letter of credit, and so acted upon by the plaintiffs. To the admission of this part of the depositions the defendants objected; but the court overruled the objection, and per-

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mitted the evidence to be read to the jury as evidence of the reliance of the plaintiffs upon the letter of credit to the amount of the \$8,000, for acceptance, payments, advances, and indorsements made to Haring. The defendants excepted to this admission of the evidence, and the propriety of this ruling of the court constitutes the first question in the case.

We are of opinion that the evidence was rightly admitted in the view and for the purposes stated by the court below. It was not offered to explain or establish the construction of the letter of credit. See Russell v. Clarke, 3 Dall. 415, s. c. 7 Cranch, 69, whether it constituted a limited or a continuing guarantee; and was not thus open to the objection which has been relied on at the bar, that it was an attempt by parol evidence to explain a written contract. It was admitted simply to establish that credit had been given to Haring upon the faith of it from time to time, and that it was treated by the plaintiffs as a continuing guarantee; so that if, in point of law, it was entitled to that character, the plaintiffs' claim might not be open to the suggestion that no such advances, acceptances, or indorsements

had in fact been made upon the credit of it; an objection [ \* 120 ] which, if founded in fact, might have been fatal \* to their claim. Nothing can be clearer upon principle, than that if a letter of credit is given, but in fact no advances are made upon the faith of it; the party is not entitled to recover for any debts due to him from the debtor, in whose favor it was given, which have been incurred subsequently to the guarantee, and without any reference to it.

The other exceptions are to certain instructions prayed by the defendants, and refused by the court.

They are as follows:—

1. That the said letter of credit sued on is not a continuing guarantee, but is a limited one; and that when an advance or advances, acceptance or acceptances, indorsement or indorsements, had been made by the plaintiffs on the faith of said letter of credit to the amount of \$8,000, the guarantee became *functus officio*, and ceased to operate upon any future advances, acceptances, or indorsements, made by said plaintiffs for Chester Haring. And that if the said plaintiffs received from said Haring, in payment of their advances, acceptances, or indorsements, made on account of said guarantee, the amount of \$8,000, it was a discharge of said letter of guarantee; and that any future advances, acceptances, or indorsements, cannot be charged against and recovered from the defendants, by virtue of said letter of credit.

2. That to entitle the plaintiffs to recover on said letter of guaran-

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tee, they must prove that notice had been given in a reasonable time after said letter of guarantee had been accepted by them, to the defendants that the same had been accepted.

3. That to entitle the plaintiffs to recover on said letter of credit, they must prove that, in a reasonable time after they had made advances, acceptances, or indorsements, for said Haring on the faith of said letters of guarantee, they gave notice to said defendants of the amount and extent thereof.

4. That to entitle the plaintiffs to recover on said letter of credit, they must prove that a demand of payment had been made of Chester Haring, the principal debtor, of the debt sued for; and in case of non-payment by him, that notice of such demand and non-payment should have been given in a reasonable time to the defendants; and in failure of such proof, the defendants are in law discharged.

5. That the promissory notes, drawn by C. Haring, the [ \*121 ] principal debtor, and indorsed by Daniel Greenleaf, and received by the plaintiffs on the 1st of May, 1829, as expressed in the said receipt of that date at the end of their said account, and the discounting the same in New Orleans by the plaintiffs after they had indorsed the same for that purpose, the same being discounted before they fell due, and the receipt of the net proceeds arising from the discounting, carried to the credit of Chester Haring's account on the books of the plaintiffs, was a discharge of the guarantors on said guarantee, provided the debt now sued for was included in the sum total of said account, on account of which said promissory notes were taken and receipted for.

6. That if the said notes, mentioned in said receipt, were received as conditional payments of said debt, the defendants are discharged, unless it be proved that due diligence has been used to recover the amount called for by said notes from the individuals responsible thereon, and that the same could not be obtained.

7. That the plaintiffs, by accepting said notes on account of said debt, from C. Haring, the principal debtor, with D. Greenleaf as indorser, on account of said debt, the same being at that time due, and receiving the money on the same by discounting them, and the passing said notes away by indorsement, could not have sued Haring for the original debt, before said notes fell due, dishonored, and returned to the plaintiffs; and that, therefore, they by their own act placed it out of their power to proceed against said Haring, to recover said debt, before said notes fell due and were returned to the plaintiffs, which, in law, discharge the guarantors.

There was another exception, but it was withdrawn from the cause by the defendants; and that, as well as another respecting the

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refusal of the court to sign the bill of exceptions, without incorporating in it the evidence given at the trial, may be dismissed without commentary. It is proper to add, however, that the conduct of the court in relation to the bill of exceptions constitutes no just matter of error revisable in this form of proceeding; and if it did, we see no reason to question the propriety of its conduct upon the present occasion. [ \*122 ] It is \*manifestly proper for the court to require that all the evidence which is explanatory of the true points of the exceptions should be brought before the appellate court, to assist it in forming a correct judgment.

The question involved in the first instruction is, whether the guarantee contained in the letter is a limited or a continuing guarantee; or, in other words, whether it covered advances, acceptances, and indorsements, in the first instance, to the amount of \$8,000, or terminated when these were discharged; or whether it covered successive advances, acceptances, and indorsements made to the same amount at any future times, *toties quoties*, whenever the antecedent transactions were discharged. Upon deliberate consideration, we are of opinion that it is a continuing guarantee; and we found ourselves upon the language, and the apparent intent and object of the letter. Every instrument of this sort ought to receive a fair and reasonable interpretation, according to the true import of its terms. It being an engagement for the debt of another, there is certainly no reason for giving it an expanded signification, or liberal construction beyond the fair import of the terms. It was observed by this court in Russell v. Clarke's Executors, 7 Cranch, 69, that "the law will subject a man, having no interest in the transaction, to pay the debt of another only when his undertaking manifests a clear intention to bind himself for that debt. Words of doubtful import ought not, it is conceived, to receive that construction." On the other hand, as these instruments are of extensive use in the commercial world, upon the faith of which large credits and advances are made, care should be taken to hold the party bound to the full extent of what appears to be his engagement; and for this purpose it was recognized by this court in Drummond v. Prestman, 12 Wheat. 515, as a rule in expounding them, that the words of the guarantee are to be taken as strongly against the guarantor as the sense will admit; Fell on Guarantee, c. 5. p. 129, &c.: and the same rule was adopted in the king's bench in Mason v. Pritchard, 12 East, 227.

If we examine the language or object of the present letter, we think it is difficult to escape from the conclusion that it [ \*123 ] \*was intended, and was understood by all the parties as a

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continuing guarantee. There is no doubt that it was so interpreted by the plaintiffs. The object is to assist Haring in business: "our friend Mr. Chester Haring," to assist him "in business may require your aid." It was not contemplated to be a single transaction, or an unbroken series of transactions for a limited period. The aid required was to be "from time to time, either by acceptance or indorsement of his paper, or advances in cash." The very nature of such negotiations, with reference to the business of the party, unless other controlling words accompanied them, would seem to indicate a succession of acts at different periods, having no definite termination or necessary connection with each other. The language of the letter then proceeds: "In order to save you from harm in so doing, we do hereby bind ourselves, &c., to be responsible to you at any time for a sum not exceeding \$8,000, should the said Chester Haring fail so to do." It is difficult to satisfy this language without giving to the guarantee a continuing operation. The parties agree to be responsible, at any time, for a sum not exceeding \$8,000; and if so, is not the natural, nay necessary import, that the acceptances, indorsements, and advances are not limited in duration; but that whenever made, and at whatever future times, the same responsibility shall attach upon them, not exceeding \$8,000? We think that it would be difficult to give any other interpretation of the language, without subjecting mercantile papers to refinements and subtleties which would betray innocent men into the most severe losses by an unsuspecting confidence in them. That the language fairly admits of, if it does not absolutely require this construction, cannot be doubted. If it does so, it is but common justice that it should receive this construction in favor of innocent parties who have made acceptances, indorsements, and advances upon the faith of it, according to the rule already stated, that the words shall be taken as strongly against the party using them as the sense will admit.

It is rare that in cases of guarantee the language of the instruments is such as to make the decision upon one an exact authority for that of another. The whole words and clauses are to \*be construed together, and that sense is to be given to each [ \*124 ] which best comports with the general scope and intent of the whole. So far as authorities go, however, we think they are decidedly in favor of the interpretation which we have adopted. In *Mason v. Pritchard*, 12 East, 227, s. c. 2 Camp. 436, the words of the guarantee were, "to be responsible for any goods he hath or may supply my brother with to the amount of £100;" and the court were of opinion that it was a continuing or standing guarantee to

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the extent of £100, which might at any time become due for goods supplied until the credit was recalled. That case was certainly founded upon words less expressive and cogent than those of the case before us. In Merle *v.* Wells, 2 Camp. 413, the guarantee was: "I consider myself bound to you for any debt he (my brother) may contract for his business as a jeweller, not exceeding £100, after this date." Lord Ellenborough held it a continuing guarantee for any debt not exceeding £100, which the brother might from time to time contract with the plaintiffs in the way of his business; and that the guarantee was not confined to one instance, but applied to debts successively renewed. The case of Sansom *v.* Bell, 2 Camp. 39, before the same learned judge, is to the same effect. The case of Bastow *v.* Bennet, 3 Camp. 220, was upon words far less stringent. There the guarantee was: "I hereby undertake and engage to be answerable to the extent of £300 for any tallow or soap supplied by B. to F. and B., provided they shall neglect to pay in due time." Lord Ellenborough held it a continuing guarantee, principally upon the force of the word *any*; but the case went off upon another point.

The cases cited on the other side are all distinguishable. Kirby *v.* The Duke of Marlborough, 2 Maule & Selw. 18, turned upon the ground that the whole recital of the bond showed that a limited guarantee, for advances to a definite amount, when they were made the guaranteee, became *functus officio*. In Melville *v.* Hayden, 3 Barn. & Ald. 593, the guarantee was: "I engage to guarantee the payment of A. to the extent of £60 at quarterly account, bill [ \*125 ] two months, "for goods to be purchased by him of B.;" and the court held, that it was not a continuing guarantee, as the words "quarterly account" import only the first quarterly account; and relied on the word "any" in Mason *v.* Pritchard, 12 East, 227, as distinguishing that case from the one before them. The case of Rogers *v.* Warner, 8 Johns. 119, was on a guarantee in these words: "If A and B, our sons, wish to take goods of you on credit, we are willing to lend our names as security for any amount they may wish;" and the court held it to be a limited guarantee for a single credit. It is observable, that here no words of continuing credit, such as "from time to time," or "at any time," are used; so that the whole language is satisfied by one transaction. It is, therefore, strongly distinguishable from that before this court.

We cannot admit, therefore, as has been contended at the bar, that the courts have inclined to vary the rule of construction of instruments of this nature, and to hold them to be *strictissimi juris* as to their interpretation. And we are well satisfied that the authorities

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in no degree interfere with the construction which we have given to the terms of the present letter. The court below were then right in refusing the first instruction.

The 2d instruction insists, that to entitle the plaintiffs to recover on the guarantee, they must prove that notice had been given to the defendants of that fact in a reasonable time after the guarantee had been accepted. Whether there was not evidence before the jury sufficient to have justified them in drawing the conclusion that there was such a notice, we do not inquire. It is sufficient for us to declare, that in point of law the instruction asked was correct, and ought to have been given. A party giving a letter of guarantee has a right to know whether it is accepted, and whether the person to whom it is addressed means to give credit on the footing of it or not. It may be most material, not only as to his responsibility, but as to future rights and proceedings. It may regulate, in a great measure, his course of conduct and his exercise of vigilance in regard to the party in whose service it is given. Especially is it important in the case of a continuing guarantee, since it may guide his judgment in recalling or suspending it.

\* The 3d instruction insists, that to entitle the plaintiffs [ \*126 ] to recover on the guarantee, they must prove that in a reasonable time after they made advances, acceptances, or indorsements for Haring on the faith of the guarantee, they gave notice to the defendants of the amount and extent thereof. If this had been the case of a guarantee limited to a single transaction, there is no doubt that it would have been the duty of the plaintiffs to have given notice of the advances, acceptances, or indorsements made to Haring, within a reasonable time after they were made. But this being a continuing guarantee, in which the parties contemplated a series of transactions, and as soon as the defendants had received notice of the acceptance, they must necessarily have understood that there would be successive advances, acceptances, and indorsements, which would be renewed and discharged from time to time, we cannot perceive any ground of principle or policy upon which to rest the doctrine that notice of each successive transaction, as it arose, should be given. All that could be required would be, that when all the transactions between the plaintiffs and Haring under the guarantee were closed, notice of the amount for which the guarantors were held responsible should, within a reasonable time afterwards, be communicated to them. And if the instruction had asked nothing more than this, we are of opinion, upon principle, as well as upon the authority of *Russell v. Clarke's Executors*, 7 Cranch, 69, and *Edmondston v. Drake*, 5 Pet. 624, that it ought to have been given. Oxley

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v. Young, 2 H. Bl. 613; *Peel v. Tatlock*, 1 Bos. & Pull. 419. But it goes much further, and requires in the case of a continuing guarantee, that every successive transaction under it should be communicated from time to time. No case has been cited which justifies such a doctrine, and we can perceive no principle of law which requires it. The instruction was, therefore, properly refused.

The 4th instruction insists, that a demand of payment should have been made of Haring, and, in case of non-payment by him, that notice of such demand and non-payment should have been given in a reasonable time to the defendants, otherwise the [ \*127 ] defendants would be discharged from their guarantee. \* We are of opinion that this instruction ought to have been given.

By the very terms of this guarantee, as well as by the general principles of law, the guarantors are only collaterally liable upon the failure of the principal debtor to pay the debt. A demand upon him and a failure on his part to perform his engagements are indispensable to constitute a *casus fæderis*. The creditors are not indeed bound to institute any legal proceedings against the debtor, but they are required to use reasonable diligence to make demand, and to give notice of the non-payment. The guarantors are not to be held to any length of indulgence of credit which the creditors may choose, but have a right to insist that the risk of their responsibility shall be fixed, and terminated within a reasonable time after the debt has become due. The case of *Allen v. Rightmere*, 20 Johns. 365, is distinguishable. There the note was payable to the defendant himself or order, at a future day, and he indorsed it with a special guarantee of its due payment; and the court held his condition absolute and not conditional.

The 5th instruction insists that the promissory notes mentioned in the receipt of the 1st of May, 1829, when discounted, and the proceeds carried to the account of Haring, operated a discharge of the guarantors provided the debt sued for was included in the sum total of the account for which those notes were received. We think that the court were not bound under the circumstances to give this instruction. It proceeds upon the ground, that the notes were necessarily received as an absolute payment, a fact which the court had no right to assume, and that, by indorsing the notes and procuring the same to be discounted and credited in the account, the guarantee was, *per se*, discharged. This is not correct in point of law; for if the plaintiffs, by their indorsements, were compellable to pay, and did afterwards pay the notes upon their dishonor by the maker, and these notes fell within the scope of the guarantee, they might, without question, recover the amount from the guarantors.

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\* The 6th instruction asserts, that if the notes mentioned [ \* 128 ] in the receipt were received as conditional payments of the said debt, the defendants are discharged, unless it is proved that due diligence had been used to recover the amount of them from the individuals responsible thereon, and that the same could not be obtained. If, by the word "recover," were here intended a recovery by a suit at law, the proposition could not be maintained. But if, as we suppose, it is used in the sense of collect or obtain; its correctness as a general proposition in cases of conditional payments of debts by notes, is admitted. He who receives any note upon which third persons are responsible, as a conditional payment of a debt due to himself, is bound to use due diligence to collect it of the parties thereto at maturity, otherwise by his laches the debt will be discharged. The difficulty is in applying the doctrine to the circumstances of the present case in the actual form in which it is propounded in the instruction. It assumes, as matter of fact, what the court cannot intend, that the notes were received as conditional payment. It does not assert what the debt is to which it alludes; though it probably refers to the debt stated in the account connected with the receipt. Now, that account is not in terms sued for; but certain drafts amounting to \$8,000, accepted and indorsed, and paid by the plaintiffs; and whether they were included in the account or not, was matter of evidence and not matter of law. Although then the instruction asserted a proposition generally true in point of law, it is not clear, that, in the very terms in which it is propounded, with reference to the case in judgment, the court were bound to give it, since it involved matters of fact.

The 7th instruction is open to a similar objection. It manifestly assumes, as its basis, general questions of fact, upon which the court had no right to pronounce judgment. It also supposes that the debt sued for is wholly confined to the account, and that the notes referred to were not within the scope of the guarantee, and, if paid by the plaintiffs, could not be recovered by the defendants; which is far from being admitted. Indeed, this, and several of the preceding instructions proceed upon the ground, that the guarantee was a limited \*and not a continuing guarantee, which construction has been already overturned. [ \* 129 ]

Upon the whole, we are of opinion that the court below erred in refusing the 2d and 4th instructions prayed by the defendants, and that for these errors the judgment must be reversed, and the cause remanded to the district court of Mississippi with directions to award *a venire facias de novo*.

**HYPPOLITUS JOSEPH AUGUSTINE ESTHO *et al.* v. BENJAMIN L. LEAR,  
ADMINISTRATOR OF THADDEUS KOSCIUSZKO.**

7 P. 130.

In a bill by next of kin, claiming to be distributees, the material facts of the domicile of the testator and of the existence of another supposed will, not being so put in issue that the court could safely make a final decree, the decree below was reversed, and the cause remanded for further proceedings.

AN appeal from the circuit court of the United States for the District of Columbia, holden in and for the county of Washington.

*Swann and Sampson*, for the appellants.

*Wirt and Dandridge*, for the appellees.

MARSHALL, C. J., delivered the opinion of the court.

The appellants had filed their bill in the court of the United States for the county of Washington, alleging themselves to be the distributees and next of kin of Thaddeus Kosciuszko, deceased, who departed this life intestate, as they allege, with respect to personal property in the United States. The bill charges that Thaddeus Kosciuszko, being about to leave America, deposited with Mr. Jefferson a paper writing purporting to be a will which was executed in Virginia, and is in the following words: —

“ I, Thaddeus Kosciuszko, being just on my departure from America, do hereby declare and direct, that, should I make no other testamentary disposition of my property in the United States, I hereby authorize my friend, Thomas Jefferson, to employ the whole thereof in purchasing negroes from among his own, or any others, and giving them liberty in my name, in giving them an education in trade or otherwise, and in having them instructed for their new condition in the duties of morality, which may make them good neighbors, good fathers or mothers, husbands or wives, in their duty as

citizens, teaching them to be defenders of their liberty and [ \*131 ] country, and of the good order of society, and in whatsoever may make them happy and useful; and I make the said Thomas Jefferson executor of this.

“ T. KOSCIUSZKO.

“ 5th May, 1798.”

After the testator's death, Mr. Jefferson proved the will in the county court of Albemarle, but renounced the executorship. Letters of administration have since been granted on it in the county of Washington in this district, to Benjamin L. Lear, who is in possession of the fund which is referred to in the paper writing. The plain-

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tiffs contend that this paper writing is not a will; or, if a will, cannot have effect, the bequest contained in it being one which the law will not sustain. They therefore contend that, this will being void and inoperative, they, as the next of kin, are entitled to this fund, there being no creditors to claim.

The answer insists on the validity of the will, and that the defendant is ready to carry the trust into execution.

Before the court can decide the intricate questions which grow out of this will, we think it necessary to possess some information which the record does not give.

The domicile of General Kosciuszko is not stated. He was a native of Poland, and died in Switzerland. Whether he was domiciliated in Switzerland or not does not appear. The law of domicile, with respect to wills in cases of testacy, or regulating distribution in cases of intestacy, may be material.

It also appears that the testator made a will in Europe. From the manner in which the subject is mentioned, we presume that this makes no disposition of his property in the United States; but, since we are informed of its existence, it would be desirable to see it.

We do not think the case properly prepared for decision; and, therefore, direct that the decree be reversed and the cause remanded with liberty to the plaintiff to amend his bill.

8 P. 52.

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#### THE UNITED STATES v. ABEL TURNER.

7 P. 132.

Under the charter of the Bank of the United States, a person who attempts to utter as true a false bill, purporting to be of that bank, and to be signed by the president and cashier thereof, is liable to indictment, although the persons whose signatures are forged were not president and cashier of that bank.

THE case is stated in the opinion of the court.

Taney, (attorney-general,) for the United States.

No counsel *contra*.

\*STORY, J., delivered the opinion of the court.

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This cause comes before the court upon a certificate of division of opinion of the judges of the circuit court for the district of North Carolina. The defendant, Abel Turner, was indicted for the forgery of, and an attempt to pass, &c., a certain paper writing in imitation of, and purporting to be a bill or note issued by the president, directors, and company of the Bank of the United States. The indictment contained several counts, all founded upon the 18th

section of the act of the 10th of April, 1816, c. 44,<sup>1</sup> establishing the Bank of the United States. Upon the trial of the cause it occurred as a question, whether the attempt to pass the counterfeit bill in the indictment mentioned, knowing the same to be counterfeit, the said bill being signed with the name of John Huske, who had not at any time been president of the Bank of the United States, but at the time of the date of the said counterfeit bill was the president of the office of discount and deposit of the Bank of the United States at Fayetteville, and countersigned by the name of John W. Sandford, who at no time was cashier of the Bank of the United States, but was, at the date aforesaid, cashier of the said office of discount and deposit, was an offence within the provisions of the act. Upon this question, the court, being divided in opinion, ordered the same to be certified to this court.

[ \* 135 ] \*The bill or note itself is not set forth in *haec verba*, except in the count on which the question arose, and which charges that the defendant, with force and arms, &c., "feloniously did attempt to pass to one S. E. as and for a true and good bill or note, a certain false, forged, and counterfeit paper writing, the tenor of which, &c., is as follows: 'the president, directors, and company of the Bank of the United States promise to pay twenty dollars on demand, at their office of discount and deposit in Fayetteville, to the order of D. Anderson, cashier thereof, Philadelphia, the 4th of July, 1827, John W. Sandford, cashier, John Huske, president,' with intent to defraud the president, directors, and company of the Bank of the United States." The bill therefore purports, on its face, to be signed by persons who are respectively president and cashier of the bank.

One of the fundamental articles of the charter (§ 11, art. 12) declares that the bills and notes which may be issued by order of the corporation, signed by the president and countersigned by the cashier, promising the payment of money to any person or persons, his, her, or their order, or to bearer, shall be binding and obligatory on the same. So that the present counterfeit bill purports to be signed by officers who were the proper officers to sign the genuine bills of the bank.

The persons named in the counterfeit bill not being in fact the president and cashier, although so called, the question arises whether the party is liable to indictment for an attempt to pass it, under the 18th section of the act of 1816.

We are of opinion that he is, within the words and true intent

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and meaning of the act. The words of the act are, "if any person shall falsely make, &c., or cause or procure to be falsely made, &c., or willingly aid or assist in falsely making, &c., any bill or note in imitation of, or purporting to be a bill or note issued by order of the president, directors, and company of the said bank, &c., &c.; or shall pass, utter, or publish, or attempt to pass, utter, or publish as true any false, &c., bill or note, purporting to be a bill or note issued by the order of the president, directors, and company of the said bank, &c., knowing the same to be falsely forged or counterfeited, &c., every such person, &c., &c." The case, therefore, falls directly within the terms of the act. It is an attempt to pass a false \*bill or note as true, purporting to be a bill or note [ \*136 ] issued by the order of the president, directors, and company; for the word "purport" imports what appears on the face of the instrument. Jones's Case, Douglas, 302; 2 Russell on Crimes, b. 4, c. 32, § 1, pp. 345, 346, 2d edition; Id. 363 to 367. The preceding clause of the section very clearly shows this to be the sense of the word in this connection. It is there said, if any person shall falsely make, &c., any bill "in imitation of or purporting to be a bill," &c., where the words "in imitation of" properly refer to counterfeiting a genuine bill, made by the proper authorized officers of the bank; and the words "or purporting to be," properly refer to a counterfeit bill, which on its face appears to be signed by the proper officers. In the view of the act, then, it is wholly immaterial whether the bill attempted to be passed be signed in the name of real or fictitious persons, or whether it would, if genuine, be binding on the bank or not.

And it is equally clear that the policy of the act extends to the case. The object is to guard the public from false and counterfeit paper, purporting on its face to be issued by the bank. It could not be presumed that persons in general would be cognizant of the fact, who at particular periods were the president and cashier of the bank. They were officers liable to be removed at the pleasure of the directors; and the times of their appointment or removal, or even their names, could not ordinarily be within the knowledge of the body of the citizens. The public mischief would be equally great, whether the names were those of the genuine officers, or of fictitious or unauthorized persons; and ordinary diligence could not protect them against imposition. 2 East's P. C. c. 19, § 44, p. 950; 2 Russell on Crimes, b. 4, c. 32, § 1, p. 341, 2d edition.

Upon examining the English authorities upon the subject of forgery and the utterance of counterfeit paper, they appear to us fully to justify and support a similar doctrine. It is, for instance,

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clearly settled that the making of a false instrument, which is the subject of forgery, with a fraudulent intent, although in the name of a non-existing person, is as much a forgery as if it had been made in the name of a person known to exist, and to whom [ \* 137 ] credit was due. 2 Russell on Crimes, \*b. 4, c. 32, § 1, 2d edition, p. 327 to 333, and the cases there cited; Id. 470, 474; 2 East, P. Cr. c. 19, § 38, p. 940. Nor is it material whether a forged instrument be made in such a manner, as that if in truth it were such as it is counterfeited for, it would be of validity or not. This was decided as long ago as Deakins's case, 1 Siderf. 142; 1 Hawk. Pl. Cr. c. 70, § 7; 2 East, P. C. c. 19, § 43, p. 948. Nor is it any answer to the charge of forgery, that the instrument is not available by reason of some collateral objection not appearing upon the face of it. 2 Russell on Crimes, b. 4, c. 32, § 1, 2d edition pp. 337 to 341; Id. 470 to 474.

So that upon the words and policy of the act itself, as well as upon the footing of authority, we are of opinion that the offence stated in the division of opinion is within the act of 1816. And we shall accordingly certify this to the circuit court.

14 P. 614.  

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## THE UNITED STATES v. JOHN B. MILLS.

7 P. 138.

A person being indicted under the 24th section of the act of March 3, 1825, (4 Stats. at Large, 109.) concerning the post-office department. *Held*, 1. That it was necessary to aver in the indictment that the offence of robbing the mail was committed. 2. That an allegation that the defendant "did procure, advise, and assist J. S. to secrete, embezzle, and destroy a letter, &c.," amounted to an averment that the offence was committed by J. S. 3. That being an indictment for a misdemeanor, it was sufficient, in this case, to describe the offence in the words of the statute.

THE case is stated in the opinion of the court.

Taney, (attorney-general,) for the United States.

No counsel *contra*.

[ \* 140 ] \*THOMPSON, J., delivered the opinion of the court.

The defendant was indicted in the circuit court of the United States for the district of North Carolina, under the 24th section of the act of 1825, entitled "an act to regulate [ \* 141 ] duce \*into one the several acts establishing and regulating the post-office department," (7 Laws U. S. 377,)

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which declares "that every person who, from and after the passing of this act, shall procure and advise, or assist in the doing or perpetration of any of the acts or crimes by this act forbidden, shall be subject to the same penalties and punishments as the persons are subject to who shall actually do or perpetrate any of the said acts or crimes, according to the provisions of this act." Upon the trial, the defendant was convicted of the offence charged in the indictment, and a motion was made in arrest of judgment, upon which motion the judges were opposed in opinion, and the case comes here upon the following certificate:—

The defendant was indicted upon the 24th section of the act of congress, approved the 3d of March, 1825, entitled "An act to reduce into one, the several acts establishing and regulating the post-office department," for advising, procuring, and assisting one Joseph I. Straughan, mail carrier, to rob the mail, and, being found guilty, submitted a motion in arrest of judgment; one reason in support of which motion was, that the indictment did not sufficiently show any offence against the said act, because the same did not directly charge or otherwise aver that the said Joseph I. Straughan did actually rob the mail; and upon argument the judges were opposed in opinion upon this question, to wit, whether an indictment grounded upon the said statute, for advising, &c., a mail carrier to rob the mail, ought to set forth or aver, that the said carrier did in fact commit the offence of robbing the mail, and therefore the judges directed the same to be certified to the supreme court.

The offence charged in this indictment is a misdemeanor, where all are principals; and the doctrine applicable to principal and accessory in cases of felony does not apply. The offence, however, charged against the defendant, is secondary in its character, and there can be no doubt, that it must sufficiently appear upon the indictment, that the offence alleged against the chief actor had in fact been committed.

The first count in the indictment alleges that the defendant did, at the time and place therein mentioned, procure, advise, and assist Joseph I. Straughan to secrete, embezzle, and destroy a letter with which he, the said Joseph I. Straughan, \*was intrusted [ \*142 ] and which had come to his possession, and was intended to be conveyed by post, &c., containing bank-notes, &c. He, the said Joseph I. Straughan, being at the time of such procuring, advising, and assisting, a person employed in one of the post-office establishments, to wit, a carrier of the mail, &c., contrary to the form of the act of congress in such case made and provided.

The second count in the indictment sets out the particular letter

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secreted, embezzled, and destroyed, containing bank-notes amounting to \$60.

The offence here set out against Straughan, the mail carrier, is substantially in the words of the statute, 2d section. If any person employed in any of the departments of the post-office establishment, shall secrete, embezzle, or destroy any letter, packet, bag, or mail of letters with which he shall be intrusted, or which shall have come to his possession, and is intended to be conveyed by post, containing any bank-note, &c., such person shall, on conviction, be imprisoned, &c.

The general rule is that in indictments for misdemeanors created by statute, it is sufficient to charge the offence in the words of the statute. There is not that technical nicety required as to form, which seems to have been adopted and sanctioned by long practice in cases of felony, and with respect to some crimes, where particular words must be used, and no other words, however synonymous they may seem, can be substituted. But in all cases the offence must be set forth with clearness, and all necessary certainty, to apprise the accused of the crime with which he stands charged.

And we think the present indictment contains such certainty, and sufficiently alleges that the offence had, in point of fact, been committed by Straughan. It charges the defendant not only with advising, but procuring and assisting Straughan to secrete and embezzle, &c. This necessarily implies that the act was done; and is such an averment or allegation, as made it necessary on the part of the prosecution to prove that the act had been done.

The particular question put in the certificate of division is, whether an indictment, grounded upon the said statute for advising, [ \* 143 ] &c., a mail carrier to rob the mail, ought to set forth or \* aver that the said carrier did in fact commit the offence of robbing the mail. The answer to this, as an abstract proposition, must be in the affirmative. But if the question intended to be put is, whether there must be a distinct, substantive, and independent averment of that fact, we should say it is not necessary, and that the indictment in this case sufficiently sets out that the offence had been committed by Straughan, the mail carrier; and that no defect appears in the indictment for which the judgment ought to be arrested.

A certificate to this effect must accordingly be sent to the circuit court.

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Pickett's Heirs v. Legerwood. 7 P.

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**MARTIN PICKETT'S HEIRS, Plaintiffs in Error, v. SAMUEL LEGERWOOD et al.**

7 P. 144.

If the defendant in error fail to move to docket and dismiss a cause, until after the record has been filed, the writ of error will not be dismissed.

A writ of error, *coram nobis*, enables a court to correct errors which preceded its judgment. It is now generally disused; a summary proceeding upon motion and affidavits, where they are necessary, being substituted.

A writ of error from this court does not lie to examine a judgment rendered on a writ of error, *coram nobis*, where the error alleged was in granting an amendment.

ERROR to the circuit court of the United States for the district of Kentucky. The case is stated in the opinion of the court.

*Loughborough*, for the motion.

*Wickliffe*, contra.

\*JOHNSON, J., delivered the opinion of the court. [ \*147 ]

This was a motion to quash the writ of error upon two grounds.

The first was because the record was not filed with the clerk of this court until the month of June, 1832, whereas the writ of error was duly served, returnable to the January term, 1832. It was contended that the case was out of court by lapse of time, and the filing at that late day could not reinstate it. But on this ground we are of opinion that the motion cannot be sustained; since the defendant in error might have availed himself of the benefit of the rule of court, which gave him the right to docket and dismiss the cause. This court decided in the case of Wood and Lide, that provided the service be before the return day of the writ, a return at a subsequent day will be sustained. 4 Cranch, 180; 2 Pet. Cond. Rep. 76.

The second ground is one which required more examination. The judgment below was rendered on a writ of error *coram nobis*, sued out in the same court, for the purpose of correcting an error committed at a previous term, and into which it was contended that the court had been surprised. We are not now called upon to decide on the merits of the cause below, nor whether it was a case proper for the application of that remedy. The motion here is to quash the writ of error, upon the ground that it is an exercise of jurisdiction in the court below which does not admit of revision in this tribunal; that it is but a different form or mode of exercising the power of the court of the first resort over its own acts, and is therefore subject to the same exceptions which have always been sustained in this court,

against revising the interlocutory acts and orders of the inferior courts.

It cannot be questioned that the appropriate use of the writ of error *coram vobis*, is to enable a court to correct its own errors; those errors which precede the rendition of judgment. In practice, the same end is now generally attained by motion; sustained, if the case require it, by affidavits; and it is observable, that so far has the latter mode superseded the former in the British practice, that Blackstone does not even notice this suit among his remedies. It seems,

it is still in frequent use in some of the States; and upon [ \* 148 ] points of fact to which the remedy \* extends, it might, perhaps, be beneficially resorted to as the means of submitting a litigated fact to the decision of a jury; an end which, under the mode of proceeding by motion, might otherwise require a feigned issue, or impose upon a judge the alternative of deciding a controverted point upon affidavit, or opening a judgment, perhaps, to the material prejudice of the plaintiff, in order to let in a plea.

But in general, and in the practice of most of the States, this remedy is nearly exploded, or at least superseded by that of amending on motion. The cases in which it is held to be the appropriate remedy will show that it will work no failure of justice, if we decide that it is not one of those remedies over which the supervising power of this court is given by law.

The cases for error *coram vobis*, are enumerated without any material variation in all the books of practice, and rest on the authority of the sages and fathers of the law. I will refer to the pages of Archbold for the following enumeration. (1st vol. 234, 276, 277, 278, 279.) "Error in the process, or through default of the clerk; error in fact, as where the defendant being under age sued by attorney, in any other action but ejectment; that either plaintiff or defendant was a married woman at the commencement of the suit; or died before verdict or interlocutory judgment, and the like."

But all the books concur in quoting the language of Rolle's Abridgment, p. 749, "that if the error be in the judgment itself, and not in the process, a writ of error does not lie in the same court, but must be brought in another and superior court."

The writ of error in this case was but a substitute for a motion to the court below, to correct an error of its own, in granting improvidently a motion for leave to amend. Many years had elapsed since entering a judgment in ejectment; the term declared on had long since expired; the *terre tenant* was changed; only one of the original defendants survived, and he had removed to a great distance from the premises recovered; on him alone notice of the motion was

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United States v. Wilson. 7 P.

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served; and the court, unaware of these facts, granted leave to amend the declaration in the original suit by extending the term more than twenty years, so as to enable the plaintiffs to sue out a writ of possession. This writ of error was sued out to enable the court \*below to correct that error; they have ordered that it [ \*149 ] shall be corrected; and from that order to set aside their former order and quash the writ of possession, is the appeal now made to the reversing power of this court.

We think the case comes precisely within the rule laid down by this court in the case of *Waldon v. Craig*, 9 Wheat. 576; with this difference that the latter was a case in which the court thought so favorably of the claim of the plaintiff in error, that they would have sustained the suit if it had been possible. The court there express themselves thus: "There is peculiar reason in this case, where the cause has been protracted, and the plaintiff kept out of possession beyond the term laid in the declaration, by the excessive delays practised by the opposite party. But the course of this court has not been in favor of the idea that a writ of error will lie to the opinion of a circuit court granting or refusing a motion like this. No judgment in the cause is brought up by the writ, but merely a decision on a collateral motion, which may be renewed."

In that case, as in this, the motion was to extend a term in ejectment, after judgment; but where the plaintiff's delay in proceeding with his writ of possession was not attributable to his own laches. He had been arrested in his course by successive injunctions sued out by the defendants. This court did there recognize the case of delay by injunction as one in which, in that action, the court might exercise the power to enlarge the term even after judgment, and the particular case as one which merited that exercise of discretion; but dismissed the writ of error, because it was a case proper for the exercise of that discretion, and not coming within the description of an error in the principal judgment.

14 P. 614; 6 H. 81; 3 Wal. 97; 18 W. 195, 196; 22 W. 249.

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#### THE UNITED STATES v. GEORGE WILSON.

7 P. 150.

A pardon is a private though official act of the executive, must be delivered to and accepted by the criminal, and cannot be noticed by the court unless it is brought before it judicially by plea, motion, or otherwise.

CERTIFICATE of division of opinion of the judges of the circuit court of the United States for the eastern district of Pennsylvania. The case is stated in the opinion of the court.

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Taney, (attorney-general,) for the United States.

No counsel *contrā*.

[ \* 158 ] \* MARSHALL, C. J., delivered the opinion of the court.

In this case, the grand-jury had found an indictment against the prisoner for robbing the mail, to which he had pleaded not guilty. Afterwards he withdrew this plea, and pleaded guilty. On a motion by the district attorney, at a subsequent day, for judgment, the court suggested the propriety of inquiring as to the effect of a certain pardon, understood to have been granted by the President of the United States to the defendant, since the conviction on this indictment, alleged to relate to a conviction on another indictment, and that the motion was adjourned till the next day. On the succeeding day, the counsel for the prisoner appeared in court, and, on his behalf, waived and declined any advantage or protection which might be supposed to arise from the pardon referred to; and thereupon the following points were made by the district attorney:—

1. That the pardon referred to is expressly restricted to the sentence of death passed upon the defendant under another conviction, and as expressly reserves from its operation the conviction now before the court.
2. That the prisoner can, under this conviction, derive no advantage from the pardon without bringing the same judicially before the court.

The prisoner, being asked by the court whether he had any thing to say why sentence should not be pronounced for the crime whereof

he stood convicted in this particular case, and whether he [ \* 159 ] wished in any manner to avail himself of the pardon referred to,

referred to, answered that he had nothing to say, and that he did not wish in any manner to avail himself, in order to avoid the sentence in this particular case, of the pardon referred to.

The judges were thereupon divided in opinion on both points made by the district attorney, and ordered them to be certified to this court.

A *certiorari* was afterwards awarded to bring up the record of the case in which judgment of death had been pronounced against the prisoner. The indictment charges a robbery of the mail, and putting the life of the driver in jeopardy. The robbery charged in each indictment is on the same day, at the same place, and on the same carrier.

We do not think that this record is admissible, since no direct reference is made to it in the points adjourned by the circuit court; and

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without its aid we cannot readily comprehend the questions submitted to us.

If this difficulty be removed, another is presented by the terms in which the first point is stated on the record. The attorney argued, first, that the pardon referred to is expressly restricted to the sentence of death passed upon the defendant under another conviction, and as expressly reserves from its operation the conviction now before the court. Upon this point, the judges were opposed in opinion. Whether they were opposed on the fact, or on the inference drawn from it by the attorney; and what that inference was, the record does not explicitly inform us. If the question on which the judges doubted was, whether such a pardon ought to restrain the court from pronouncing judgment in the case before them, which was expressly excluded from it, the first inquiry is, whether the robbery charged in the one indictment, is the same with that charged in the other. This is neither expressly affirmed nor denied. If the convictions be for different robberies, no question of law can arise on the effect which the pardon of the one may have on the proceedings for the others.

If the statement on the record be sufficient to inform this court judicially that the robberies are the same, we are not told on what point of law the judges were divided. The only inference we can draw from the statement is, that it was \*doubted [ \*160 ] whether the terms of the pardon could restrain the court from pronouncing the judgment of law on the conviction before them. The prisoner was convicted of robbing the mail, and putting the life of the carrier in jeopardy, for which the punishment is death. He had also been convicted on an indictment for the same robbery, as we now suppose, without putting life in jeopardy, for which the punishment is fine and imprisonment; and the question supposed to be submitted is, whether a pardon of the greater offence, excluding the less, necessarily comprehends the less, against its own express terms.

We should feel not much difficulty on this statement of the question, but it is unnecessary to discuss or decide it.

Whether the pardon reached the less offence or not, the first indictment comprehended both the robbery and the putting life in jeopardy, and the conviction and judgment pronounced upon it extended to both. After the judgment, no subsequent prosecution could be maintained for the same offence, or for any part of it, provided the former conviction was pleaded. Whether it could avail without being pleaded, or in any manner relied on by the prisoner, is substantially the same question with that presented in the second point, which is, 'that the prisoner can, under this conviction, derive no advantage

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from the pardon, without bringing the same judicially before the court by plea, motion, or otherwise."

The constitution gives to the President, in general terms, "the power to grant reprieves and pardons for offences against the United States."

As this power had been exercised from time immemorial by the executive of that nation, whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.

A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime

he has committed. It is the private, though official act of [ \* 161 ] the executive magistrate, delivered to the \*individual for whose benefit it is intended, and not communicated officially to the court. It is a constituent part of the judicial system that the judge sees only with judicial eyes, and knows nothing respecting any particular case of which he is not informed judicially. A private deed, not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown and cannot be acted on. The looseness which would be introduced into judicial proceedings, would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles, and overturn those rules which have been settled by the wisdom of ages.

Is there any thing peculiar in a pardon which ought to distinguish it in this respect from other facts?

We know of no legal principle which will sustain such a distinction.

A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him.

It may be supposed that no being condemned to death would reject a pardon; but the rule must be the same in capital cases and in misdemeanors. A pardon may be conditional; and the condition may be more objectionable than the punishment inflicted by the judgment.

The pardon may possibly apply to a different person or a different crime. It may be absolute or conditional. It may be controverted

## United States v. Wilson. 7 P.

by the prosecutor, and must be expounded by the court. These circumstances combine to show that this, like any other deed, ought to be brought "judicially before the court by plea, motion, or otherwise."

The decisions on this point conform to these principles. Hawkins, b. 2, c. 37, § 59, says: "But it is certain that a man may waive the benefit of a pardon under the great seal, as where one who hath such a pardon doth not plead it, but takes the general issue, after which he shall not resort to the \*pardon." In section 67, he [ \* 162 ] says, "an exception is made of a pardon after plea."

Notwithstanding this general assertion, a court would undoubtedly at this day permit a pardon to be used after the general issue. Still, where the benefit is to be obtained through the agency of the court, it must be brought regularly to the notice of that tribunal.

Hawkins says, section 64, "it will be error to allow a man the benefit of such a pardon unless it be pleaded." In section 65, he says, "he who pleads such a pardon must produce it *sub fide sigilli*, though it be a plea in bar, because it is presumed to be in his custody, and the property of it belongs to him.

Comyn, in his Digest, tit. Pardon, letter H, says: "If a man has a charter of pardon from the king, he ought to plead it in bar of the indictment; and if he pleads not guilty he waives his pardon." The same law is laid down in Bacon's Abridgment, title Pardon, and is confirmed by the cases these authors quote.

We have met with only one case which might seem to question it. Jenkins, page 129, case 62, says: "If the king pardons a felon, and it is shown to the court, and yet the felon pleads guilty, and waives the pardon, he shall not be hanged; for it is the king's will that he shall not, and the king has an interest in the life of his subject. The books to the contrary are to be understood where the charter of pardon is not shown to the court."

This vague *dictum* supposes the pardon to be shown to the court. The waiver spoken of is probably that implied waiver which arises from pleading the general issue; and the case may be considered as determining nothing more than that the prisoner may avail himself of the pardon by showing it to the court, even after waiving it by pleading the general issue. If this be, and it most probably is the fair and sound construction of this case, it is reconciled with all the other decisions, so far as respects the present inquiry.

Blackstone, in his 4th vol. p. 337, says, "a pardon may be pleaded in bar." In p. 376, he says, "it may also be pleaded in arrest of judgment." In p. 401, he says, "a pardon by act \* of [ \* 163 ] parliament is more beneficial than by the king's charter; for

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United States v. Brewster. 7 P.

a man is not bound to plead it, but the court must, *ex officio*, take notice of it; neither can he lose the benefit of it by his own laches or negligence, as he may of the king's charter of pardon. The king's charter of pardon must be specially pleaded, and that at a proper time; for if a man is indicted and has a pardon in his pocket, and afterwards puts himself upon his trial by pleading the general issue, he has waived the benefit of such pardon. But if a man avails himself thereof, as by course of law he may, a pardon may either be pleaded on arraignment, or in arrest of judgment, or, in the present stage of proceedings, in bar of execution."

The reason why a court must *ex officio* take notice of a pardon by act of parliament, is, that it is considered as a public law; having the same effect on the case as if the general law punishing the offence had been repealed or annulled.

This court is of opinion that the pardon in the proceedings mentioned, not having been brought judicially before the court by plea, motion, or otherwise, cannot be noticed by the judges.

10 P. 286; 18 H. 807; 7 Wal. 580.

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THE UNITED STATES v. SAMUEL BREWSTER.

7 P. 164.

A draft drawn by the president of a branch of the Bank of the United States on the principal bank, is not a bill, within the clauses of its charter which provide for the offences concerning forged bills.

CERTIFICATE of division of opinion of the judges of the circuit court of the United States for the eastern district of Pennsylvania.

The defendant was indicted for uttering the following instrument, and upon the trial the judges were opposed in opinion upon the question.

(5) F 745  
Cashier

F 745 (5)  
of the

Bank of the United States,  
Pay to C. W. Earnest, or order, five dollars  
Office of Discount and Deposit in Pittsburgh, the 10th day of December, 1829.  
A. BRACKENRIDGE, Pres.

J. CORRY, Cash.

Fairman, Draper, Underwood & Co.

(Indorsed)

Pay the bearer,  
C. W. EARNEST.

[ \* 165 ] \* "Whether the genuine instrument of which the said false, forged, and counterfeited instrument is in imitation, is a bill issued by order of the president and directors of the said bank, according to the true intent and meaning of the 18th section

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Bank of Alexandria v. Hooff. 7 P.

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of the act of congress, passed on the 16th day of April in the year of our Lord 1816, (3 Stats. at Large, 275,) entitled "An act to incorporate the subscribers of the Bank of the United States."

*Taney*, attorney-general, for the United States. The defendant did not appear by counsel.

A certificate was directed to be issued to the circuit court, to the effect that \*the genuine instrument, of which the said [ \* 167 ] false, forged, and counterfeited instrument, in the certificate of division mentioned, is in imitation, is not a bill issued by order of the president, directors, and company of the Bank of the United States, according to the true intent and meaning of the 18th section of the act of congress, passed on the 16th day of April, in the year of our Lord 1816, entitled, "An act to incorporate the subscribers of the Bank of the United States."

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FARMERS' BANK OF ALEXANDRIA v. JOHN HOOFF *et al.*

7 P. 168.

Upon a bill in equity to obtain a decree for a sale of a lot of land to satisfy an alleged lien by a deed of trust, the matter in controversy is the amount of the debt, not the value of the land; so that the plaintiff cannot appeal if his debt claimed is below the requisite sum.

MOTION to dismiss an appeal from the circuit court of the United States of the District of Columbia for the county of Alexandria.

The grounds are stated in the opinion of the court.

*Fudall*, for the motion.

*Lee*, contra.

\*MARSHALL, C. J., delivered the opinion of the court. [ \* 170 ]

This is a motion to dismiss an appeal from a decree of the court of the United States for this district, sitting in the county of Alexandria; because the matter in controversy does not amount to \$1,000.

The bill was filed for the purpose of obtaining a decree for the sale of a lot, on which a deed of trust had been given to secure the payment of a sum of money amounting with interest to less than \$1,000. The bill was dismissed, and from this decree an appeal was taken.

The appellant alleges, in support of the jurisdiction of the court, that the real question is, whether the debtor be entitled to the lot, and as that is worth more than \$1,000, this court may take jurisdiction, though the sum claimed in the bill is less.

The court is of a different opinion. The real matter in controversy is the debt claimed in the bill; and though the title of the lot may be inquired into incidentally, it does not constitute the object of the suit.

The appeal is dismissed.

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JOHN HOLMES, MICHAEL OMEALY, RICHARD CATON, HUGH THOMPSON,  
AND WILLIAM SLATER, Appellants, v. DANIEL TROUT, WILLIAM  
MORELAND, WALTER MORELAND, JEREMIAH TROUT, JACOB OVER-  
PECK, AND WILLIAM BUCHANNAN, Appellees.

7 P. 171.

Construction of certain entries and surveys in Kentucky.

A call for a survey, which had not acquired notoriety, will not of itself support an entry; but if the survey called for has been made conformably to a valid entry, such a call may be good. In Kentucky, the cancellation of a deed after its delivery, does not revest the title in the grantor.

If an amended bill sets up a new title, the statute of limitations runs against that title, till the filing of the amended bill.

Surplus land does not vitiate a survey, in Kentucky.

The case is stated in the opinion of the court

*Wickliffe*, for the appellant.

*Loughborough*, contra.

[ \* 202 ] \* M'LEAN, J., delivered the opinion of the court.

This appeal is prosecuted by the complainants, to reverse a decree of the circuit court of Kentucky.

The original bill was filed by John Holmes, Michael Omealy, Richard Caton, Hugh Thompson, and William Slater, who set up a title under the following entry. "Edward Voss enters 10,000 acres by virtue of two treasury warrants, Nos. 8991 and 8990, beginning at the northwest corner of Patton's 8,400 acres survey; thence, with Allen's line, westwardly to the river, and along Roberts's line to the east for quantity;" "also, 5,000 acres by virtue of treasury warrant, No. 8989, beginning at the southwest corner of Patton's 8,400 acres survey, then westwardly with Patton, Pope, and Thomas's survey; thence up the river, and on Patton's line on the east, for quantity."

The complainants represent that surveys having been executed on these entries, they were assigned to Peyton Short, who obtained the patents bearing date the 12th and 16th days of March, 1790. That Short afterwards conveyed both tracts to the complainant John Holmes, who, by virtue of certain contracts, holds the land in trust for the other complainants; all the complainants having a joint interest

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in it. The entries of Voss are alleged to be valid, and also the surveys and patents.

The defendants are represented to be in possession of a part of these tracts of land, under grants older than the complainants,' but which were founded on entries made subsequent to the complainants'; and they pray that the defendants may be decreed to convey their respective rights to the complainants.

\* In May term, 1829, the complainants filed an amended [ \* 203 ] bill, in which they state that the land in contest was purchased for the use and benefit of Holmes, Slater, Caton, and Omealy. That by subsequent transactions, Omealy became the trustee of Slater and Caton; and that an agreement was entered into between the complainants and a certain John Breckenridge, by which he undertook to render certain services, for which he was to have one moiety of the land; and the original deed to Holmes, never having been recorded, was by the complainants, handed to Breckenridge, with other papers which related to the business, accompanied with directions to Short to make another deed; and full powers, as they are advised, were given by them to Breckenridge to take a deed from Short, vesting the title to one half of the lands in himself, and the other in the complainants. That Breckenridge having obtained possession of the deed made to Holmes, being vested with the power, did agree with Short to cancel that deed, and it was accordingly cancelled. And the complainants represent that Omealy, trustee for John Holmes and William Slater, and Hugh Thompson, trustee for Richard Caton, did on the 21st day of September, 1804, receive and take a deed to Breckenridge and themselves, as above stated, and did deliver over the deed of Holmes to Short, who cancelled it by erasing his name therefrom.

It is further stated in the amended bill, that Breckenridge died before the services which constituted the consideration, on which a moiety of the land was conveyed to him, were fully rendered; and on a bill being filed by the complainants against Breckenridge's heirs, they were decreed to convey to the complainants a certain part of their interest in the land. This decree was entered at November term, 1822.

In answer to the amended bill, the defendants, Jeremiah Trout, Daniel Trout, William Buchanan, Jacob Overpeck, John Moreland, Walter A. Moreland and William Moreland, allege that they had been in the actual occupancy and peaceable possession of all the land claimed by them for upwards of twenty years before the amended bill was filed.

It was agreed between the parties that John Howard entered on

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the land in controversy, by virtue of his claim of 7,945<sup>1</sup> [ \* 204 ] \* acres, by his tenants, within the claim of C. Clarke ; that the entry was within the boundary of said Clarke, and that Howard's claim wholly covered the claim of Clarke ; that this entry into the possession was made in the year 1804, and continued, without interruption, adverse to the claim of Voss and Short, and those who claim under them, until the year 1813, when William Moreland, a purchaser from Clarke, brought an action of ejectment against Howard and evicted him. That possession was taken by Moreland, which has been held by him and his devisees ever since. It was admitted that Daniel Trout, in the year 1808, purchased the claim of Daniel and Hite's 600 acres within complainants' claim ; and that Daniel and Jeremiah Trout entered into the possession under such purchase, and ever since have held, by themselves and their grantees, Overpeck and Buchannan, adversely to the complainants.

As the entry of Voss, under which the complainants claim, was made before the entries under which the defendants claim, the complainants have a prior equity if their entry can be sustained. The validity of this entry, therefore, is the first point for examination. It calls to begin at the northwest corner of Patton's 8,400 acres survey, and for Allen and Roberts's line. Patton's entry was made on the 26th December, 1782, for 8,400 acres, upon a treasury warrant, No. 12,311, about two miles up the first branch above the Eighteen Mile Creek, beginning at a tree marked J. P., to run north five miles, then to extend off at right angles for quantity ; this entry was surveyed on the 20th September, 1783, and calls to begin at a mulberry, elm, and sugar tree, marked J. P., standing on the bank of the first large creek running into the Ohio above the Eighteen Mile Creek, two miles up the said creek. On the 11th October, 1783, John Allen entered 1,000 acres, part of a treasury warrant, No. 14,198, beginning at the northwest corner of Patton's 8,400 acres survey, and running with his line south 250 poles, thence down the creek on both sides, westwardly for quantity, to be laid off in one or more surveys.

[ \* 205 ] \* Roberts's entry bears date on the 26th December, 1782, the same day Patton's entry was made.

As Voss's entry can only be sustained by sustaining the survey and entry of Patton, it will be proper in the first place to inquire into their validity.

To support the entry of Patton, several witnesses were examined. Merriwether Lewis states that Eighteen Mile Creek, one of the descriptive calls in this entry, was known previous to the year 1782, and that Patton's Creek is the first one falling into the Ohio above

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Eighteen Mile Creek, except Bell's Spring branch, which is not much more than a mile in length; that Patton's Creek was so called from the time the above entry was made, and was generally pretty well known by that name as early as October, 1783. He does not recollect the year he became acquainted with the tree marked J. P., but he thinks, within a year or two after the entry was made, he was at the tree marked, which stood two miles up Patton's Creek, lacking 40 poles. The letters J. P. were very large, and marked on a mulberry tree standing near the creek; that Patton informed him of the entry shortly after it was made, and that he had marked the tree, and run one of the lines before he made the entry. From the appearance of the letters on the tree when he first saw it, the witness has no doubt that it was marked at the time represented by Patton. He was enabled to find the marked tree without difficulty, from Patton's description of it; and he thinks that any subsequent locator could not have failed to find it. Having found the beginning corner of Patton's survey, the witness says his northwest corner, which is called for in Voss's entry, could be found by tracing the line of the survey to that corner.

Joseph Saunders, another witness, states, that in the year 1780, Eighteen Mile Creek was well known, and that Patton's Creek is the first branch or creek of any note which falls into the Ohio above Eighteen Mile Creek. In May, 1783, Patton showed him a mulberry tree marked J. P., standing on the north bank of Patton's Creek, about two miles from the mouth of said creek, which he said was the beginning corner of his entry. As the letters were large, and the tree stood on the \*bank of the creek, the witness [ \* 206 ] thinks it might have been found by any one in search of it.

Several other witnesses prove that Eighteen Mile Creek was well known before Patton's entry, and that Patton's Creek is the first considerable stream which falls into the Ohio above Eighteen Mile Creek; and that after Patton's entry, the creek was called by his name, but they were not acquainted with his entry and survey until some years after they were made.

It is first objected to this entry, that in the case of *Merriwether v. Davidge*, 2 Littell, 38, the court of appeals of Kentucky decided it was invalid. Its descriptive as well as locative calls are not sufficient, it is urged, to lead an inquirer to the beginning called for; and that a marked tree is not a good call, though the calls which lead to it designate objects of notoriety, unless it be proved that the tree was marked at the time the entry bears date, or prior to that time. And as there is no such proof in the present case, the entry must be

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considered void. These and other arguments are used against the validity of this entry.

As it regards the decisions of the court of appeals referred to, it may be proper to remark, that it was made on a different state of facts from that which is proved in the present case. Merriwether Lewis, who was a party in that cause, could not, of course, be a witness; and on examining his deposition it will be seen that he states several important facts respecting the entry.

The decision of the court of appeals was conclusive upon the rights of the litigant parties in all courts; but the inquiry into the validity of Patton's entry is only collateral to the merits of the present case, and a decision upon it, under such circumstances, can in no respect affect the rights which were settled in the case of Merriwether v. Davidge. This consideration and the variance of the proof in that cause from the evidence in this, leave no doubt that the court should regard the validity of this entry as open for investigation in the present cause.

From the evidence it is clear, that Eighteen Mile Creek was publicly known before Patton's entry, and that the first [ \* 207 ] branch \* above Eighteen Mile Creek, which suits the call, was the one on which the entry was made. A person therefore, desirous of finding the beginning of this entry, could have no difficulty in designating Patton's Creek. He must then search for the marked tree about two miles up this creek.

But it is objected that the entry does not state how near the creek the marked tree stands, nor on which side of it; and that it falls short of two miles, on a straight line, forty poles. The tree stands near the bank of the creek, as appears from the evidence; and the letters marked being large, could easily be seen. The variation of forty poles from the distance called for, was as little as could reasonably be expected, when the circumstances under which this entry was made are considered; and to look for the marked tree within the range of forty poles both up and down the creek, from the exact distance of two miles, would not require unreasonable labor of a subsequent locator. Nor does it seem to be unreasonable that he should examine on both sides of the creek.

Several of the witnesses say, from the calls in the entry, Patton's beginning corner could have been found without difficulty. This was all that the law required. But it is said that there is no proof at what time the tree was marked. Lewis said it was within a year or two after the entry purports to have been made; and he has no doubt, from the appearance of the marks that they were made as early as the date of the entry. Experience enables a person to judge

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with great accuracy how long marks have been made, from their general appearance. In May, 1783, only six months after the entry, Saunders saw the marked tree. From these facts, and other circumstances of the case, the evidence established at least *prima facie* that the tree called for was marked when the entry was made. If other trees were shown bearing the same marks at other places on the creek, it might create so great an uncertainty as to invalidate this entry. But no such facts are proved in the case.

After an attentive examination of the evidence in relation to this entry, the conclusion in favor of its validity may be safely drawn. In coming to this result, no established principle of law is controverted, nor any sound process of reasoning.

\* But it is contended that if the beginning of Patton's entry be established, it does not follow that the entry of [ \* 208 ] Voss is good; as it calls for the northwest corner of Patton's survey, which is not the beginning corner, and that a survey which has not been recorded cannot support an entry.

Voss made his entry about twenty days after Patton's survey was executed, and before it was recorded; but the call for the survey necessarily includes the entry, if the survey has been made in pursuance of the entry. It must be admitted that a survey of itself, which had not acquired notoriety, is not a good call for an entry. But when the survey has been made conformably to the entry, and the entry can be sustained, as in the case of Patton, the call for the survey may support an entry. The boundaries for the survey must be shown, as has been done in the present case. *Johnson v. Marshall*, 4 Bibb, 133; *Clay v. M'Kinney*, 3 Marshall, 570; also the same book, 573, 577, and 190.

Patton calls to run from his beginning corner north five miles, and in making his survey, he ran near six. This shows, it is contended, that the entry of Patton has not been accurately surveyed, and consequently, Voss's entry must fail.

It has been long a settled principle in Kentucky, that surplus land in a survey does not vitiate it; and such a survey is held to have been made conformably to entry. The inquiry is not, therefore, whether the line of Patton, from the beginning corner to his northwest corner, which is called for by Voss, and the other lines of Patton, are the exact distances designated; but whether they were so made as to conform to his entry, within the established rule on the subject. Of this there can exist no doubt.

Any one desirous of finding the beginning corner of Voss, having found the tree marked J. P., would trace the line running north to the corner called for by Voss. This he could have no difficulty

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in finding, although this line is longer than called for in Patton's entry.

That Patton's survey was made before the entry of Voss, appears from the date of the survey and other facts in the case.

From these considerations, the court think that the complainants have sustained the entry under which they claim.

[ \* 209 ] \* In the further examination of the case, it will be necessary to inquire, whether the title set up by the complainants under the deed executed by Short, in 1796, or the one he executed to the complainants and Breckenridge, in 1804, shall be held valid. Both deeds are for the same tract of land; and the complainants in this court earnestly contend that their title under the deed executed in 1796 vests in them a good legal title. From the circumstances under which this deed was executed, and the subsequent proceedings in regard to it, as set forth in the amended bill, the circuit court held this deed to be null and void. With the view to establish the validity of this deed, the complainants alleged a diminution of the record, and this court, at the present term, awarded a *certiorari*, directing the record of the suit in chancery by the complainants against Short and the heirs of Breckenridge to be certified, on the ground that it is supposed to have been made a part of the record in the present case. That suit was brought by the complainants in the circuit court, to procure a reconveyance from the heirs of Breckenridge, of one moiety of the land in controversy, which had been conveyed to their ancestor by Short, under the deed of the 21st of September, 1804, on the ground that he had died before the professional services, which formed the consideration of the grant, were performed. On the final hearing of this case, the court decreed that the defendants should release a part of the land to the complainants, in pursuance of which deeds were executed.

On the hearing, several depositions and letters were read, tending to show that the deed from Short to Holmes in 1796, was duly executed. A part of this evidence seems to have been extracted from this record, and used on the final hearing in the circuit court of the cause now under examination. This evidence has been certified up with the record, as forming a part of the case; but it is alleged that, as in the amended bill, the decree and the deeds made in pursuance of it, in the case against the heirs of Breckenridge, were made a part of it; and as in the opinion of the court there is a reference to the proceedings in that case, they form a part of the record in the suit now before the court.

The decree and the deeds in that suit, which were made [ \* 210 ] a \* part of the amended bill, were incorporated into the record by the court below, and undoubtedly form a part of

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it: but it cannot be admitted that the evidence in that case, except so far as it was extracted and used in the circuit court, is admissible in this case. That suit was between different parties, and the points presented for the action of the court were different.

No evidence can be looked into in this court, which exercises an appellate jurisdiction that was not before the circuit court; and the evidence certified with the record must be considered here, as the only evidence before the court below. If, in certifying the record, a part of the evidence in the case had been omitted, it might be certified in obedience to a *certiorari*; but in such case it must appear from the record that the evidence was used, or offered to the circuit court.

It is to be regretted that on the hearing in the court below any evidence was omitted which is deemed material in the case, but it is now too late to remedy the omission.

To prove the execution of the deed by Short to Holmes, in 1796, the deposition of William Moreton, one of the subscribing witnesses, was read. He proves his own signature, and also the signatures of James Russell and Francis Jones, who were also subscribing witnesses, and he proves the signature of the grantor, although a stroke of the pen is made over it. The witness further states that he was written to by Mr. Short, to endeavor to make sales of lands for him, which he did not do; but on being told "by John Holmes what was the best he could do with the land, he advised him to sell, and told him he thought Short would be satisfied." "That he understood the lands were sold, and the papers, or a part of them, between Short and Holmes in relation to the sales, were sent to him, as he believes, to close the business with Short. On the examination of his letter book, he finds a copy of a letter to Mr. John Holmes, under date of January 3, 1797, on which day he forwarded to him by Mr. Hughes, inclosed in said letter, the above deed."

On the 10th January, 1803, Holmes wrote to Moreton from Baltimore, and says: "The lands you sold on account of Mr. Short, were held by Thompson, Mr. Caton, and myself. These gentlemen will correspond with you respecting them, to which you will \*please to attend. I will thank you to do every thing in [ \*211 ] your power to get the necessary title papers, &c., for my proportion; Mr. Omealy, my trustee, has the direction, who will direct you as it respects me."

Mr. Caton wrote to Moreton, it is presumed, at the same time, that the interest he had in the lands jointly, he some time before transferred to William Slater, of Baltimore, who would write to him in conjunction with Mr. Thompson and Mr. Omealy, Mr. Holmes's trustee.

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And on the 13th of January, 1803, Mr. Omealy, as trustee for John Holmes, William Slater, and H. Thompson, wrote to Moreto, inclosing the above letters, and they say : "The annexed letters from Holmes and Mr. Caton inform you of our being the proprietors and legal representatives of the land bought of Short, and heretofore held by Mr. Holmes, amounting, we believe, to 14,500 acres. By an agreement with Mr. Breckenridge, your senator in congress, he has undertaken to procure us a good title, and to effect a sale of the lands. We therefore request that you will surrender into his hands all the papers and documents you may have relating to them, that the title may be vested in him by Short and yourself; and by this authority we require yourself, Mr. Short, and all others concerned, to consider Mr. Breckenridge as our assignee for the lands in question, subject to the agreements entered into by Mr. Breckenridge and us."

The papers surrendered to Breckenridge in pursuance of this letter were : "A copy of a letter from Peyton Short to John Holmes, dated Richmond, 29th September, 1794." "An original letter from Peyton Short to Mr. William Moreton, dated Woodford, 2d April, 1795." Also : "A copy of a paper, dated Baltimore, 9th May, 1795, addressed to Mr. John Holmes, and signed by William Moreton, attorney for Peyton Short, respecting the conveyance of 14,000 acres of land;" but these papers were not copied into the record, and there is no proof that they were used as evidence on the hearing in the circuit court.

From this evidence, without reference to the facts stated in the amended bill, it would be difficult to come to a satisfactory [ \* 212 ] \* conclusion, as it regards the execution of the deed in 1796.

There can be no doubt, from the deposition of Moreton, that it was signed by Short, and it is probable that it was forwarded to Holmes, as stated in Moreton's deposition; but there is no evidence of its having been received by him, or that he treated it as a valid instrument. It would seem from the letter of Holmes, dated the 10th of January, 1803, that he was not at that time in possession of this deed; for he requests Moreton "to do every thing in his power to get the necessary title papers," &c. And the memorandum of the paper delivered to Breckenridge, dated 9th May, 1795, which was addressed to Holmes, and signed by Moreton as attorney for Short, and which respected the conveyance of 14,000 acres of land, could not have referred to an absolute sale of the land to Holmes, it would seem, as Moreton states in his deposition, that he did not sell to him. But even admitting that in this respect the memory of Moreton is incorrect, and that, as attorney of Short, he did sell the land to Holmes, does it not appear probable, from the deposition of More-

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ton, that the conveyance to Holmes was made with a view of enabling him to dispose of the land for the benefit of Short? And if this were the case, whether Holmes first sold the land to his co-complainants, retaining an interest in it himself, or became interested in it by any other means, it does not appear that he was ever actually in possession of the deed, or claimed title under it. If strong doubts rested upon this part of the case, a reference to the amended bill would dispel them. But the facts there alleged, it is insisted, were stated through the mistake of counsel, and that the rights of the complainants ought not therefore to be prejudiced by them.

On such an allegation the court cannot disregard the case which the complainants have made in their bill. They allege expressly that the deed executed by Short to Holmes, never having been recorded, was delivered up and cancelled by those who had full powers on the subject, and that another deed was executed by Short, upon proper authority, vesting the fee to one moiety of the land in Breckenridge, and the other in the complainants. And by reference to the decree, in the "case against the heirs of Breck- [ \*213 ] enridge, it appears that this deed was treated as a valid instrument, as the heirs were required to convey a part of the land held under it to the complainants.

The principle is admitted that the mere cancelling of a deed does not reinvest the title in the grantor under the laws of Kentucky; but, under the circumstances of this case, the court are clear that the deed to Holmes must be considered as a nullity. It has been so treated by the parties themselves, not only, it would seem, by the decree against the heirs of Breckenridge, but by the express allegations of the amended bill. If, therefore, it were proved that this deed had been delivered to Holmes, or was found among his papers after his assignment, the court could not hold it valid in opposition to the acts and allegations of the complainants. The conveyance may have been made with the sole view of enabling Holmes to convey to others who had purchased; and a different arrangement being made, as the deed had not been recorded, and Holmes not having acted under it, it was properly surrendered, with all other papers relating to the land, to Breckenridge, by those who had full power to do so, as stated in the amended bill; on which surrender Short executed the deed to the complainants and Breckenridge. Whatever may have been the facts in regard to the delivery of the deed to Holmes and its surrender, this court have no difficulty in treating it as a void instrument, under all the circumstances of the case.

In this view of the facts, the complainants must rest their legal title to the land in controversy, on the deed executed in 1804, agreeably to

the case made in their amended bill. Whatever equitable claim the complainants may have had to this land, the deed to Breckenridge, conveyed one moiety of it to him; and the next point of inquiry is whether the decree obtained against the heirs of Breckenridge, and the conveyances executed in pursuance of it, as set forth in the amended bill, must be considered as setting up a new right, so as to give to a part of the defendants the benefit of the statute of limitations which they plead.

The conveyance was executed to Breckenridge on the consideration of services to be rendered in establishing the title to [ \* 214 ] \* the land. These services were only rendered in part before the decease of Breckenridge, and on that ground the court decreed that his heirs, to whom the land descended, should convey to the plaintiffs a part of the land.

Before the conveyances under this decree, the complainants could not be considered as having any claim to the land conveyed to Breckenridge, more than they would have had if the contract had been to pay money instead of services, and he had failed in paying a part of the amount. In such a case, the complainants might have asked a rescission of the contract, except for so much of the land as had been paid for. Or, they might have asked a specific execution of the contract; or have compelled the payment of the residue of the consideration by an action at law. But, until the complainants had made their election to proceed against the land, and had, through the decree of a court of chancery, obtained a conveyance of it, they possessed no specific right to the land which they could enforce either in law or equity, against persons in possession under an adverse claim. It therefore follows that the title set up in the amended bill, under the decree against the heirs of Breckenridge, is a new right, and must be considered as having been first asserted by the amended bill; and as this bill was filed in May term, 1829, the statute of limitation will constitute a good bar so far as the right under the decree is asserted against the defendants, who have held adversely twenty years or upwards.

It is true the complainants are non-residents, but so far as the land obtained by the decree against the heirs of Breckenridge is concerned, the statute had begun to run before the decree, and that proceeding does not arrest it.

The survey of Voss was made for 8,500 acres, on the 16th February, 1789, and the patent was issued to Short, as the assignee of Voss, on the 16th March, 1790, for 8,500 acres. In running the lines of the survey, which purports to appropriate only 8,500 acres of the entry, they were made to include a large surplus of land,

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beyond the calls of the entry. But before this survey was executed several entries were made, \* under which a part of [ \*215 ] the defendants claim, and which are embraced in the survey.

It becomes, therefore, necessary to determine between these conflicting rights.

The principle is well settled that a junior entry shall limit the survey of a prior entry to its calls. This rule is reasonable and just. Until an entry be surveyed, a subsequent locator must be governed by its calls ; and this is the reason why it is essential that every entry shall describe with precision the land designed to be appropriated by it. If the land adjoining to the entry should be covered by a subsequent location, it would be most unjust to sanction a survey of the prior entry beyond its calls, and so as to include a part of the junior entry.

This principle is not contested by the complainants, but they deny its application to the case under consideration. They insist that the designation of the number of acres in the survey, below the amount called for in the entry, was a mistake of the surveyor. That it was the intention of Voss to survey his entire entry, as is evidenced by the number of acres actually included in the survey. And the well settled rule is relied on, that surplus land will not vitiate a survey.

The intention of the surveyor can only be known by his official acts, and a resort to these in the present case will show that he intended only to survey 8,500 acres of the 10,000 acres entry. It is true, the lines include a very large surplus ; but this, according to the rule stated, does not render the survey void.

The locator may survey his entry into one or more surveys, or he may, at pleasure, withdraw a part of his entry. Where a part of a warrant is withdrawn, the rules of the land-office require a memorandum on the margin of the record of the original entry, showing what part of it is withdrawn. It does not appear that any record of a withdrawal of a part of Voss's entry was made ; and from this fact it is argued that none was intended to be withdrawn.

The question is not exclusively one of intention, or whether any part of this warrant has been withdrawn. If a withdrawal appeared upon the record, it would be conclusive ; but must not the right to withdraw 1,500 acres of the entry be equally as conclusive as if it had been done ? And is not this \*right [ \*216 ] incontrovertibly established by the fact, that only 8,500 acres of the original entry have been surveyed and patented ?

If a mistake was made by the surveyor, why was it not corrected before the emanation of the grant, or at some subsequent period ?

This might have been done at any time by the holder of the claim.

Whatever may be the facts in regard to a mistake of the surveyor, this court cannot correct it; nor does it prevent the complainants from withdrawing 1,500 acres of the entry, and making a location elsewhere; or perhaps from still executing the survey for this quantity under the original entry. If in the latter case the right would be barred by the statute of limitations, or in the former it would be ineffectual from the lapse of time or the want of vacant land, the loss is chargeable to the negligence of the complainants, and those under whom they claim.

From this construction of the survey, it follows that the right asserted under it must be limited by the valid entries under which a part of the defendants claim, to the calls of the entry which shall cover the quantity of acres that the surveyor purported to survey. The same construction must be given to the survey as if it had been made on an entry for 8,500 acres, which, by subsequent locations, was limited strictly to its calls.

As the line of Allen is called for as one of the boundaries of Voss's entry, it is necessary to give a construction to Allen's entry, and ascertain where this line should be established. Allen's entry was not surveyed at the time Voss made his location. This entry calls to "begin at the northwest corner of Patton's 8,400 acres survey, and to run with his line south 250 poles, thence down the creek on both sides for quantity; to be laid off in one or more surveys."

The circuit court directed the survey of Allen's entry to be so made, from the base line called for, as that the lines shall include Barebone Creek, and be parallel to its several courses, &c.

It appears, from the survey executed in pursuance of this [ \* 217 ] \*construction of Allen's entry, that near where the creek falls into the Ohio River, there is a bend in it which renders it impracticable to include the mouth of the creek in the survey; but, with the exception of this bend, the creek is included. As it is impracticable to include the mouth of this creek in the survey, it is insisted by the complainants' counsel that this survey of the entry is incorrectly made, and that the court should have directed it to be made by running at right angles from the base line for quantity.

In support of this position several authorities have been cited. In the case of *Preble v. Vanhoover*, 2 Bibb, 120, the court say, "that the call to run eastwardly is an indefinite expression, signifying on which side of the base line the land is to lie; and that a rectangular

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figure is not to be departed from, unless the calls of the entry are incompatible with that figure."

But in the same case the entry called to include an improvement, and the court decided that the length of the given base and the call to include the improvement being incompatible, the former must yield, so far as necessary, to comply with the latter. In Hardin, 208, the construction of an entry is given by the court of appeals of Kentucky. They say that in the construction of entries it is difficult to lay down general rules that will not necessarily admit of many exceptions. Each case must frequently depend upon its own peculiar circumstances; but it is evident that every entry itself must be resorted to for discovering the locator's intention, in construing which the whole entry, like other writings, should be taken together. "But if, from a fair and reasonable exposition of the entry, a call appears to have been made through mistake, and is repugnant to the locator's intention, it ought to be rejected, the court say, as surplusage, and not suffered to vitiate the whole entry. Therefore, they say, the object called for should not be so repugnant as to be incapable of misleading a subsequent inquirer with ordinary caution." "It should be practicable to comply with the call; and, in general, it should be a tangible object, either natural or artificial, not a mere ideal one." The court also say, that a certain line should be run southwest, "not only because they conceive the locator's intention sufficiently manifest, but because they esteem it a \*good rule that [ \*218 ] the lines of every survey should be as nearly parallel to each other, and as nearly at right angles, as the 'calls of the entry' will admit; and when not controlled by such calls as evidently show the locator's intention to be otherwise, the court will give its calls this construction, as being the most reasonable, and the least subject to exception."

These views contain the general principles which have been established in Kentucky, and by which entries in that State must be governed.

It will be observed, that in giving a construction to an entry, the intention of the locator is to be chiefly regarded, the same as the intention of the parties in giving a construction to a contract. If a call be impracticable, it is rejected as surplusage, on the ground that it was made through mistake; but if a call be made for a natural or artificial object, it shall always control mere course and distance. Where there is no object called for to control a rectangular figure, that form shall be given to the survey.

These principles must now be applied to the call for the creek in Allen's entry.

It is objected that this creek is not called by any particular name and the reason no doubt was, that, at the time Allen's entry was made, no name had been given to it. Nor was any name given to the creek on which Patton's entry was made. Subsequent to that entry it was called Patton's Creek, from the fact of his entry having been made on its bank.

Barebone Creek seems to be a stream of some magnitude; and it does not appear that there is any other creek which answers the call in Allen's entry. This creek is a natural object, and is crossed by the base line of the entry; and could any one doubt the intention of the locator, under such circumstances, to include the land on both sides of the creek by his call "to run down the creek on both sides westwardly, for quantity?" It is true, the mouth of this creek is not included in the survey which was directed by the circuit court, but the mouth of the creek is not called for specifically; and it does not appear, but that if the exact quantity of land called for in the entry had been surveyed, that the creek would have passed through the whole length of the tract. The call is not to run [ \* 219 ] "to the Ohio River, but "down the creek on both sides for quantity."

It would be difficult to make a call more specific than this, or one which would be less likely to mislead any subsequent locator. Is the fact that the creek, by an unusual deviation from its general course, near its junction with the Ohio, passes out of the boundaries designated, calculated to mislead any one? Suppose it passed out of the limits of the survey five or ten poles before the lines closed, would this, by the principles laid down, require the call to be rejected? Could that fact lead any one into error? And unless such a deviation would require the court to reject the call, it cannot be rejected on the ground alleged. The creek, by the survey executed, runs through the tract about seven eighths of the entire length of the line, and the extraordinary bend which carries it out of the survey cannot vitiate the call, or render it substantially repugnant.

The question which arises out of these facts is, whether this call shall not control the survey, so as substantially to conform to it. The call to run westwardly having nothing else to control it, would, according to the established rule of construction, require the lines to be run at right angles from the base. But the court are clearly of opinion that the call to run down the creek on both sides for quantity must control the survey, and that the construction given to the entry by the circuit court was correct.

This line of Allen's entry being established, it forms the lower boundary of Voss's survey; and it remains only to say that, agree-

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ably to the calls of his entry, the survey must be extended up the river and along Roberts's line, so as to include 8,500 acres. The survey cannot be extended beyond this limit, so as to interfere with valid entries which were made before the original survey of Voss. This was the construction given to the rights of the complainants under their entry and survey, and this court sustain that construction.

The decree of the circuit court must be affirmed, with costs.

9 H. 451.

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WILLIAM YEATON and others, Appellants, v. DAVID LENOX and others.

7 P. 220.

Under the act of March 3, 1803, (2 Stats. at Large, 244,) an appeal, prayed after the expiration of the term, must be proceeded with like a writ of error.

The 22d section of the Judiciary Act (1 Stats. at Large, 84) requires a citation signed by a judge, and served at least thirty days before the return day of the writ of error.

APPEAL from the circuit court of the United States for the county of Alexandria, in the District of Columbia.

Coxe, for the appellees, moved to dismiss this appeal.

Neale, contra.

MARSHALL, C. J., delivered the opinion of the court.

\* In this case a decree was pronounced by the court of [ \* 221 ] the United States for the county of Alexandria, in December, 1829, from which the defendants in that court appealed, but did not bring up the record. At January term, 1832, the appellees, in pursuance of a rule of this court, brought in the record, filed it, and moved that the suit should be dismissed. The court ordered a dismissal. On the 9th day of March, 1832, a citation was signed by the chief justice of the court for the District of Columbia, citing the plaintiffs in the original action to appear before the supreme court, then in session, and show cause why the decree of the circuit court should not be corrected.

A copy of the record was returned with this citation "executed," and filed with the clerk. The appellees move to dismiss the suit because the record has been irregularly brought up.

The act of March, 1803, which gives the appeal from decrees in chancery, subjects it to the rules and regulations which govern writs of error. Under this act it has been always held that a decree may be prayed in court when the decree is pronounced; but if the appeal

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be prayed after the court has risen, the party must proceed in the same manner as had been previously directed in writs of error.

The Judicial Act directs that a writ of error must be allowed by a judge, and that a citation shall be returned with the record; the adverse party having at least thirty days' notice. This notice, we understand, is thirty days before the return day of the writ of error.

In this case the appeal is not allowed by the judge, and the citation is to appear before the court then sitting. The record is brought up irregularly, and the cause must be dismissed.

6 H. 81; 18 H. 580; 9 O. 609.

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**BERNARDO SAMPEYREAC AND JOSEPH STEWART, Appellants, v. THE UNITED STATES, Appellees.**

7 P. 222.

Under the act of May 8, 1830, (4 Stats. at Large, 399,) authorizing the superior court of the territory of Arkansas to entertain a bill of review, to revise certain decrees — *Held*, 1. That the original decree, being made in a suit in which the sole complainant was a fictitious person, was a mere nullity. 2. That the act giving the new remedy by bill of review was constitutional. 3. That congress had power to mould this remedy and dispense with technical rules concerning bills of review. 4. That, as the original complainant was fictitious, a forged deed in that name gave no title, and the purchaser, from the grantee on that deed, acquired no title which a court of equity could protect.

THE case is stated in the opinion of the court.

*Prentiss and White*, for the appellants.

*Fulton and Taney*, (attorney-general,) *contra*.

[ \* 234 ] \* THOMPSON, J., delivered the opinion of the court.

This case comes up on appeal from the superior court in the territory of Arkansas.

The decree of the court was founded upon proceedings instituted under an act of congress entitled "An act for further extending the powers of the judges of the superior court of the territory of Arkansas, under the act of the 26th May, 1824,<sup>1</sup> and for other purposes," passed the 8th of May, 1830.

This act declares that the act of 1824, (7 Laws U. S. [ \* 235 ] 300,) \* shall be continued in force, so far as the said act relates to the claims within the territory of Arkansas, until the 1st day of July, 1831, for the purpose of enabling the court in Arkansas, having cognizance of claims under the said act, to proceed

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<sup>1</sup> 4 Stats. at Large, 52.

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by bills of review, filed or to be filed in the said court on the part of the United States, for the purpose of revising all or any of the decrees of the said court, in cases wherein it shall appear to the said court, or be alleged in such bills of review, that the jurisdiction of the same was assumed in any case on any forged warrant, concession, grant, order of survey, or other evidence of title. And in every case wherein it shall appear to the said court, on the prosecution of any such bill of review, that such warrant, concession, grant, order of survey, or other evidence of title, is a forgery, it shall be lawful, and the said court is hereby authorized to proceed, by further order and decree, to reverse and annul any prior decree or adjudication upon such claim; and, thereupon, such prior decree or adjudication shall be deemed and held in all places whatever to be null and void to all intents and purposes.

Upon the proceedings on the bill of review instituted under this act, the court pronounced the following decree: "It is, therefore, adjudged, ordered, and decreed that the former decree of this court, in favor of the defendant, Bernardo Sampeyreac, against the United States, for 400 acres of land, pronounced and recorded at the December term of this court, in the year 1827, be, and the same is hereby reversed, annulled, and held for naught." From this decree the present appeal was taken.

To a right understanding of the questions which have been made at the bar, it will be necessary briefly to state the proceedings which took place under the original bill.

That bill or petition was filed on the 21st of November, 1827, under the provisions of the act of the 26th of May, 1824, (7 Laws U. S. 300,) setting forth that the complainant, Bernardo Sampeyreac, on the 6th of October, 1789, he then being an inhabitant of Louisiana, presented a petition to the then governor of the province, asking a grant for a tract of land in full property, containing ten arpens in front, by the usual depth, on \*Strawberry River, [ \*236 ] &c. That afterwards, on the 11th of October, 1789, the governor granted the petition. That, at the time the grant was so made, an order of survey was issued to the surveyor-general of the province. That, by virtue of such grant and order of survey, the petitioner acquired a claim to the land; which claim is secured to him by the treaty between the United States and the French republic, of the 30th of April, 1803.

The district attorney put in an answer denying the several facts and allegations in the bill; and alleging that grants could only be made legally to persons in existence and actually residing in Louisiana. That Sampeyreac, in whose name the bill is filed, is a fictitious

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person, never having had any actual existence; or if such person ever had any existence, he was a foreigner; or is now dead, and made no transfer or assignment of the claim in his lifetime. That he has no legal representative in existence; nor is there any one now living who is authorized to file this bill, or prosecute this suit, and prayed that the bill might be dismissed.

A witness, by the name of John Heberard, was examined and sworn to all the material facts necessary to establish the claim; and the court thereupon ordered, adjudged, and decreed that the said Bernardo Sampeyreac recover of the United States the said 400 arpens of land.

The bill of review is founded upon the allegation that the original decree was obtained by fraud and surprise. That the original petition and order of survey, exhibited in the case, are forged. That Heberard and the other witnesses in the cause, committed the crime of perjury. That the order of survey was never signed by Mero, governor of Louisiana, as the same purports to have been; and that this fact has come to the knowledge of the district attorney since the decree was entered. And the bill further charges that the said Sampeyreac is a fictitious person.

At the October term, 1830, this bill was taken, *pro confesso*, against Sampeyreac; at which term the appellant, Joseph Stewart, appeared in court, and prayed to be made a defendant, and have [ \* 237 ] leave to file an answer to the bill. This was resisted \* by the district attorney; but an order was made by the court permitting Stewart to be made a defendant, with leave to file an answer. To which the district attorney excepted.

The answer of Stewart denies the frauds and forgeries alleged in the bill, but avers that, if there was any fraud, corruption, or forgery, he is ignorant of it; and that he was a *bond fide* purchaser of the claim for a valuable consideration from one John J. Bowie, who conveyed to him the claim of the said Bernardo Sampeyreac, by deed bearing date about the 22d of October, 1828. Upon the final hearing the court reversed the original decree, as has been already stated.

The objections which have been taken at the bar to this decree, may be considered under the following points:—

1. Whether, under the act of 1824, the court had authority to entertain the bill of review; and, if not, then,
2. Whether the act of 1830 is a constitutional law, and confers such authority.
3. Whether the proceedings on this bill of review can be sustained under the act of 1830.
4. Whether, admitting Stewart to be a *bond fide* purchaser of the claim of Sampeyreac, he is protected against the title set up by the United States.

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1. We think it unnecessary to go into an examination of the questions which have been made under the first point. Although the act of 1824 directs that every petition which shall be presented under its provisions, shall be conducted according to the rules of a court of equity, it may admit of doubt whether all the powers of a court of chancery, in relation to bills of review, are vested in that court. And as the view taken by this court upon the other points, renders a decision upon this unnecessary, we pass it over without expressing any opinion upon it.

2. The ground upon which it has been argued that the act of 1830 is unconstitutional is, that a right had become vested in Stewart before the act was passed; and that the effect and operation of the law is to deprive him of a vested right. To determine the force and application of this objection, it becomes necessary to look at the claim, as it now appears, before the court. It is found by the decree of the court below, and is \*admitted at the bar, that [ \* 238 ; Sampeyreac is a fictitious person. That the petition purporting to have been presented by him to Mero, governor of the province of Louisiana, and the order of survey alleged to have been made thereupon, are forgeries. These are the only evidence of title upon which the original claim rests. And it is proved and admitted that the deed purporting to have been given by Sampeyreac to Bowie, under whom Stewart claims, is also a forgery. The bill or petition filed in the original cause, alleges that the claim is secured by the treaty between the United States and the French republic, of the 30th of April, 1803.<sup>1</sup> This, however, has not been insisted upon on the argument here; and there is certainly no color for pretending that a claim founded in fraud and forgery is sanctioned by the treaty. The title to the land in question passed by the treaty, and became vested in the United States; and there has been no act, on the part of the United States, by which they have parted with the title. It is contended, however, that this right or title has been taken away by the original decree in this case, under the act of 1824. By the 14th section of that act, all its provisions are extended to the territory of Arkansas; and it is declared that the superior court of that territory shall have, hold, and exercise jurisdiction in all cases, in the same manner, and under the same restrictions and regulations in all respects, as is given by the said act to the district court of the State of Missouri. And, by the 2d section of the act, it is declared that in all cases the party, against whom the judgment or decree of the court may be finally given, shall be entitled to appeal within one year from

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<sup>1</sup> 8 Stats. at Large, 200.

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its rendition, to the supreme court of the United States, the decision of which court shall be final and conclusive between the parties and, should no appeal be taken, the judgment or decree of the district court shall in like manner be final and conclusive. No appeal was taken within the year; and the question is, whether the United States, by neglecting to appeal, have lost their right; and, if not, whether the remedy provided by the act of 1830, to assert that right, is in violation of the constitution. If Sampeyreac was a real person, and appeared here setting up this objection, it might present a different question; although it is not admitted, even in that case,

[ \*239 ] \*that the United States would be concluded as to the right.

But the original decree in this case was a mere nullity; it gave no right to any one. The title still remained in the United States; and the most that can be said is, that, by omitting to appeal within the time limited by the act, the remedy thereby provided was gone, and the decree became final and conclusive with respect to such remedy. But the act of 1830 provides a new remedy; and it may be added that the act of 1824 declares the decree to be final and conclusive between the parties. And, as Sampeyreac was a fictitious person, he was no party to the decree, and the act in strictness does not apply to the case. But, considering the act of 1830 as providing a remedy only, it is entirely unexceptionable. It has been repeatedly decided in this court that the retrospective operation of such a law forms no objection to it. Almost every law providing a new remedy, affects and operates upon causes of action existing at the time the law is passed. The law of 1830 is in no respect the exercise of judicial powers. It only organizes a tribunal with powers to entertain judicial proceedings. When the original decree was entered, there was no person in existence whose claim could be ripened into a right against the United States by omitting to appeal. Stewart was not only no party to the decree, but his purchase from Bowie was nearly a year after the decree was entered.

Had Sampeyreac been a real person, having a decree in his favor, and Stewart had afterwards purchased of Bowie the right which that decree established, it might have given him some equitable claim; but it would have been subject to all prior equitable, as well as legal rights. Nor would it be available in any respect in the present case, for Stewart in no manner whatever connects himself with Sampeyreac. As it is admitted that the deed purporting to have been given by Sampeyreac to Bowie is a forgery, Stewart is therefore a mere stranger to this decree, and can derive no benefit from it.

It is said, that if this bill of review was filed under the act of 1830, the court had no jurisdiction; the bill having been filed in

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April, and the law not passed until the May following. But the act in terms applies to bills filed or to be filed, and of course \* cures his defect, if any existed. Such retrospective effect [ \* 240 ] is no unusual course, in laws providing new remedies.

The act of 1803, amending the judicial system of the United States, 3 Laws U. S. 560,<sup>1</sup> declares, that from all final judgments or decrees, rendered or to be rendered, in any circuit court, &c., an appeal shall be allowed to the supreme court, &c.

It therefore forms no objection to the law, that the cause of action existed antecedent to its passage; so far as it applies to the remedy, and does not affect the right.

3. But it is objected, in the next place, that this bill of review cannot be sustained, under the act of 1830. That it was not filed and prosecuted under the limitations and restrictions, and according to the course and practice of a court of chancery in such a proceeding. We think it unnecessary to examine whether all the technical rules required in the ordinary course of chancery proceedings, on a bill of review, have been pursued in the present case. The act clearly does not require it. It authorizes bills of review to be filed on the part of the United States, for the purpose of revising all or any of the decrees of the said court, in cases wherein it shall appear to the said court, or be alleged in such bills of review, that the jurisdiction of the same was assumed, in any case, on any forged warrant, concession, grant, order of survey, or other evidence of title. If congress had a right to provide a tribunal in which the remedy might be prosecuted, they clearly had a right to prescribe the manner in which it should be pursued. The great and leading object was to provide for revising the original decree, or granting a new trial. The material allegation required is, that the original decree was founded upon some forged evidence of title; and this is very fully set out in the bill. That it was not the intention of the law, that the court should be confined to the technical rules of a court of chancery on bills of review, is evident from the provision in the last clause of the 1st section of the act, which directs the court to proceed on such bills of review, by such rules of practice and regulations as they may adopt for the execution of the powers vested or confirmed in them by the act.

4. The next inquiry is, whether the appellant, Stewart, has \* acquired a right to the land, by reason of his standing in [ \* 241 ] the character of a *bond fide* purchaser. The record contains an admission, on the part of the United States, that he purchased the claims of John J. Bowie, by deed, for a valuable consideration, in

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good faith, sometime in November or December, 1828. But this gave him no right to be let in as a party in the bill of review; he was not a party to the original bill, nor could he connect himself with Sampeyreac, the only party to the bill, he being a fictitious person; and the interest of Stewart, whatever it might be, was acquired long after the original decree was entered. He was, therefore, a perfect stranger to that decree. The deed purporting to have been given by Sampeyreac to Bowie, is admitted to be a forgery. Bowie, of course, had no interest, legal or equitable, which he would convey to Stewart. But admitting Stewart to have been properly let in as a party in the bill of review, the only colorable equity which he showed, was the certificate of entry given by the register of the land office, December 13, 1828; and this certificate, founded on a decree in favor of Sampeyreac, a fictitious person, obtained by fraud, and upon forged evidence of title. This certificate is entirely unavailable to Stewart. He can obtain no patent under it if the original decree should remain unreversed; for the act of 1830 forbids any patent thereafter to be issued, except in the name of the original party to the decree; and on proof, to the satisfaction of the officers, that the party applying is such original party or is duly authorized by such original party or his heirs to receive such patent. The original party to the decree being a fictitious person, no title would pass under the patent, if issued. It would still remain in the United States. But Stewart acquired no right whatever under the deed from Bowie, the latter having no interest, that he could convey. In the case of Polk's Lessee v. Wendall, 5 Wheat. 308, it is said by this court, that, on general principles, it is incontestable that a grantee can convey no more than he possesses. Hence, those who come in under the holder of a void grant, can acquire nothing.

Upon the whole, we think, Stewart was improperly admitted [ \* 242 ] to become a party; but, considering him a proper party, he has shown no ground upon which he can sustain a right to the land in the question.

The decree of the court below is accordingly affirmed, with costs.



**JOHN BARRON, Survivor of JOHN CRAIG, for the Use of LUKE TIERNAN,  
Executor of JOHN CRAIG, v. THE MAYOR AND CITY COUNCIL OF  
BALTIMORE.**

7 P. 243.

The provision in the 5th amendment of the constitution, declaring that private property shall not be taken for public use without just compensation, is only a limitation of the power of the United States; it is not applicable to the legislation of the several States.

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ERROR to the court of appeals of the western shore of the State of Maryland.

Case by the plaintiff in error against the city of Baltimore, to recover damages for injuries to the wharf-property of the plaintiff, arising from the acts of the corporation.

The city, in the asserted exercise of its corporate authority over the harbor, the paving of streets, and regulating grades for paving, and over the health of Baltimore, diverted from their accustomed and natural course, certain streams of water, which flow from the range of hills bordering the city, and diverted them, so that they made deposits of sand and gravel near the plaintiff's wharf, and thereby rendered the water shallow, and prevented the access of vessels.

\* The decision of Baltimore county court was against the [ \* 244 ] defendants, and a verdict for \$4,500 was rendered for the plaintiff. The court of appeals reversed the judgment of Baltimore county court, and did not remand the case to that court for a further trial. From this judgment the defendant in the court of appeals, prosecuted a writ of error to this court.

*Mayer*, for the plaintiffs.

*Taney and Scott*, contra, were stopped by the court

\* MARSHALL, C. J., delivered the opinion of the court. [ \* 247 ]

The judgment brought up by this writ of error having been rendered by the court of a State, this tribunal can exercise no jurisdiction over it, unless it be shown to come within the provisions of the 25th section of the Judicial Act.<sup>1</sup>

The plaintiff in error contends that it comes within that clause in the 5th amendment to the constitution, which inhibits the taking of private property for public use, without just compensation. He insists that this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a State, as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause.

The question thus presented is, we think, of great importance, but not of much difficulty.

The constitution was ordained and established by the people of the United States for themselves, for their own government and not for the government of the individual States. Each State established a constitution for itself, and, in that constitution, provided such limi-

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<sup>1</sup> 1 Stats. at Large, 85

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tations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

If these propositions be correct, the 5th amendment must be understood as restraining the power of the general government, not as applicable to the States. In their several constitutions they [ \* 248 ] have imposed such restrictions on their respective \* governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest.

The counsel for the plaintiff in error insists that the constitution was intended to secure the people of the several States against the undue exercise of power by their respective state governments; as well as against that which might be attempted by their general government. In support of this argument he relies on the inhibitions contained in the 10th section of the 1st article.

We think that section affords a strong if not a conclusive argument in support of the opinion already indicated by the court.

The preceding section contains restrictions which are obviously intended for the exclusive purpose of restraining the exercise of power, by the departments of the general government. Some of them use language applicable only to congress; others are expressed in general terms. The 3d clause, for example, declares that "no bill of attainder or *ex post facto* law shall be passed." No language can be more general; yet the demonstration is complete that it applies solely to the government of the United States. In addition to the general arguments furnished by the instrument itself, some of which have been already suggested, the succeeding section, the avowed purpose of which is to restrain state legislation, contains in terms the very prohibition. It declares that "no State shall pass any bill of attainder or *ex post facto* law." This provision, then, of the 9th section, however comprehensive its language, contains no restriction on state legislation.

The 9th section having enumerated, in the nature of a bill of rights, the limitations intended to be imposed on the powers of the general

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government, the 10th proceeds to enumerate those which were to operate on the state legislatures. These restrictions are brought together in the same section, and are by express words applied to the States. "No State shall enter into any treaty," &c. Perceiving that in a constitution framed by the people of the United States for the government of all, no limitation of the action of government on \* the people would apply to the state government, unless [ \* 249 ] expressed in terms; the restrictions contained in the 10th section are in direct words so applied to the States.

It is worthy of remark, too, that these inhibitions generally restrain state legislation on subjects intrusted to the general government, or in which the people of all the States feel an interest.

A State is forbidden to enter into any treaty, alliance, or confederation. If these compacts are with foreign nations, they interfere with the treaty-making power, which is conferred entirely on the general government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the constitution. To grant letters of marque and reprisal, would lead directly to war; the power of declaring which is expressly given to congress. To coin money is also the exercise of a power conferred on congress. It would be tedious to recapitulate the several limitations on the powers of the States which are contained in this section. They will be found, generally, to restrain state legislation on subjects intrusted to the government of the Union, in which the citizens of all the States are interested. In these alone were the whole people concerned. The question of their application to States is not left to construction. It is averred in positive words.

If the original constitution, in the 9th and 10th sections of the 1st article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government, and on those of the States; if in every inhibition intended to act on state power, words are employed which directly express that intent; some strong reason must be assigned for departing from this safe and judicious course in framing the amendments, before that departure can be assumed.

We search in vain for that reason.

Had the people of the several States, or any of them, required changes in their constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments; the remedy was in their own hands, and would have been applied by themselves. A \* conven- [ \* 250 ] tion would have been assembled by the discontented State, and the required improvements would have been made by itself. The

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unwieldy and cumbrous machinery of procuring a recommendation from two thirds of congress, and the assent of three fourths of their sister States, could never have occurred to any human being as a mode of doing that which might be effected by the State itself. Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention. Had congress engaged in the extraordinary occupation of improving the constitutions of the several States by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

But it is universally understood, it is a part of the history of the day, that the great revolution which established the constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government, not against those of the local governments.

In compliance with a sentiment thus generally expressed to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the States. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.

We are of opinion that the provision in the 5th amendment to the constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as [ \* 251 ] a limitation on the exercise of power by the \*government of the United States, and is not applicable to the legislation of the States. We are therefore of opinion, that there is, no repugnancy between the several acts of the general assembly of Maryland, given in evidence by the defendants at the trial of this cause, in the court of that State, and the constitution of the United States. This court, therefore, has no jurisdiction of the cause; and it is dismissed.

14 P. 540; 6 H. 410; 10 H. 511; 18 H. 71; 20 H. 84; 5 Wal. 475; 7 Wal. 821; 9 W. 278;  
16 W. 125; 21 W. 557; 2 O. 552; 7 O. 589.

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**CHARLES VATTIER, Appellant, v. THOMAS S. HINDE, JAMES B. HINDE,  
MARTHA HINDE, AND JOHN M. HINDE, Infants, &c.**

7 P. 252.

Though the complainant may be obliged to join a party who is within the jurisdiction in order to a final decree, yet if his joinder would defeat the jurisdiction, and the decree can be so framed as not to affect his interest, he may be stricken out, and the suit may proceed against the other defendants.

A disclaimer on the record, by a party whose name is stricken out to sustain the jurisdiction, will be noticed by the court so far as to learn from it what his interest is.

When a suit has been revived by a bill of revivor, the evidence which had been taken is used as if no abatement had occurred.

The reversal of a decree does not annul an agreement of the parties as to the admission of evidence.

The protection extended by a court of equity to a *bonâ fide* purchaser, belongs only to the purchaser of the legal title without notice of an outstanding equity. He who purchases no legal title cannot have this protection.

The court cannot act on a title stated only in a special replication, filed without leave of court.

THE case is stated in the opinion of the court. It was formerly before the court, and is reported 1 Pet. 241.

*Caswell*, for the appellant.

*Ewing and Clay*, for the appellee.

\* MARSHALL, C. J., delivered the opinion of the court. [ \*254 ]

This suit was originally brought in the court of the United States for the 7th circuit and district of Ohio, sitting in chancery, by Thomas S. Hinde, and Belinda, his wife, for the conveyance of a lot of ground in the town of Cincinnati, designated in the plan of the town by the number 86.

The bill alleges, that Abraham Garrison, under whom all parties claim, sold and conveyed the said lot of ground to William and Michael Jones, as is proved by his receipt in the following words: "Received, Cincinnati, 10th September, 1790, of William and Michael Jones, £50 13s. 3d., in part, of a lot opposite Mr. Coun's, in Cincinnati, for \$250, which I will make them a warrantee deed for on or before the 20th day, this instant. Signed, ABRAHAM GARRISON.

"Test, Jacob Awl."

That a deed was executed the succeeding day, which has been lost. That on the 26th of March, 1800, William Jones, acting for and in the name of William and Michael Jones, conveyed the lot to Thomas Doyle, Jr., then an infant; and \* that his father, [ \*255 ] Thomas Doyle, took possession of it in the name of his son, and retained possession until his death; that the said Thomas

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Doyle, Jr. having survived both his parents, died under age in the year 1811, leaving the plaintiff, Belinda, his sister by the mother's side, and heir at law.

The bill then alleges that in the year 1814 the plaintiff, Thomas S. Hinde, in right of his wife, took possession of the said lot and placed a tenant on it; after which, in the year 1819, he obtained a deed of confirmation from William Jones.

The bill further charges, that James Findley, Charles Vattier, Robert Ritchie, William Lytle, George Ely, and William Dennison, knowing the title of the plaintiffs, but discovering that the deed from Garrison to William and Michael Jones was lost, have procured a deed from Garrison to some one of them, and have turned his tenant out of possession. The plaintiffs have commenced an ejectment against the tenants in possession, but are advised that they cannot support it. They therefore pray for a conveyance for discovery and for general relief.

The receipt of Abraham Garrison to William and Michael Jones, and the deed of William, purporting to convey for Michael and himself, with the deed of confirmation executed by Michael, are filed as exhibits. The record also contains a deed of John C. Symmes, dated the 31st of July, 1795, conveying the lot to Abraham Garrison. The deed from Jones to Doyle is in the name of William and Michael Jones, and is signed W. and M. Jones; but concludes: "In witness whereof the said William Jones hath hereunto set his hand and seal, the day and year first above mentioned."

James Findley answers, that having obtained a judgment for a large sum against Charles Vattier, the lot 86, with other real property to a large amount, was transferred to him in the year 1807 in satisfaction thereof, and possession of the lot was given. In the year 1815 he was informed that Abraham Garrison claimed the lot, and on searching the record could find no conveyance from him for it. He purchased it from Garrison for the sum of \$700, on condition of

his conveying twenty-three feet, part thereof to Abraham [ \*256 ] Garrison, Jr., \*the son of the vendor. Conveyances were executed in pursuance of this contract. Previous to this purchase, he understood that Thomas Doyle was once the owner of the lot, that it had been sold at a sheriff's sale as his property, and purchased by Charles Vattier. When he purchased, Garrison assured him that he had never sold the lot; and his inquiries among the old settlers respecting the sale to William and Michael Jones, were answered by assurances that they knew nothing more than report, that Thomas Doyle had claimed the lot, and that it was sold by the sheriff as his property. Never heard that the plaintiff, T. S. Hinde, had

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been in possession. In April, 1818, on a compromise with Charles Vattier, he conveyed to him all his interest in the lot.

The deed from Findley to Vattier is made in consideration of one dollar, and a final settlement of all claims.

The answer of Charles Vattier states, that in the year 1800 the lot was advertised by the sheriff of Hamilton county to be sold under execution, issued on a judgment he obtained against Thomas Doyle, at which sale he became the purchaser at the price of \$20. Neither the return of the sale nor the deed made to him by the sheriff can be found. He has no other knowledge of the title of Thomas Doyle than that the lot was called his. He held possession under the sale until James Findley became possessed thereof in 1807. In the year 1818 James Findley conveyed the lot to him for a valuable consideration, after which he conveyed to William Lytle.

The answer of William Lytle states, that he purchased part of the lot 86 from Charles Vattier in 1818, for \$15,400. He had no knowledge of the claim of Thomas Doyle, Jr. Some time before the purchase he had heard that Mr. Hinde had taken possession of some lots claimed by Thomas Doyle, deceased, but does not recollect which lots.

The answer of Robert Ritchie states, that he is a purchaser for a valuable consideration, without notice of that part of the lot No. 86 which was conveyed by James Findley to Abraham Garrison, Jr.

Sundry depositions were taken and exhibits filed, after which the cause came on to be heard, and the court decreed Charles

\* Vattier and Robert Ritchie severally to convey to the plaintiffs [ \*257 ] the parts they respectively held of the lot 86. From this decree the defendants appealed to this court.

On a hearing, the decree was reversed, because Abraham Garrison was not made a party; and the cause was remanded to the circuit court with directions to permit the plaintiffs to amend their bill, and make Abraham Garrison a party, and to proceed *de novo*.

On the return of the cause to the circuit court, the death of the plaintiff, Belinda, being suggested, the suit was revived as to her heirs; and a bill of revivor, and an amended and supplemental bill was filed, making Abraham Garrison a party.

The bill, after reciting the matter of the original bill, and stating the death of Belinda Hinde without issue, whereby the plaintiff, T. S. Hinde, became entitled to a life-estate, as tenant by the courtesy, and the other plaintiffs, who are infants, were entitled as the only issue and heirs of the said Belinda; prays that the suit and all the proceedings in it may stand revived and be prosecuted by the said Thomas, for himself, and for them as their next friend. The bill then charges that James Bradford, Thomas Doyle, and John Bradshaw

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were brother officers; that Bradshaw executed a voluntary bond to Thomas Doyle, the son of Thomas Doyle, binding himself to convey to him 250 acres of land, part of a large tract, which is very valuable. This bond was delivered to Thomas Doyle, the father, for the benefit of his son, who afterwards sold the land to Samuel C. Vance for a large sum of money, which he received. To indemnify his son, he procured the lot No. 86 to be conveyed to him. This intention was declared at the time. He was then indebted, but not insolvent. Cincinnati then contained not more than 100 inhabitants, and this transaction was generally known. After the execution of the bond to T. Doyle, the son, J. Bradshaw, departed this life leaving a will in which he devised his whole estate to T. Doyle the elder. The estate of the father descended to his son, and on his death to his half-sister Belinda, after which the plaintiff, T. S. Hinde, confirmed the sale to Vance.

After T. Doyle, the father, had taken possession of lot | \* 258 ] No. \* 86 for his son, sundry lots in Cincinnati were sold as his property under execution, some of which were purchased by Vattier; but lot 86 was not among them.

It remained open and unimproved until 1814, when the plaintiff, T. J. Hinde, took possession and placed a tenant on it.

Vattier, erroneously supposing himself to have purchased this lot 86 among others, examined into the title, and must have become fully apprised of the title of T. Doyle the younger, as the deed from Jones to him was on record, and recites the deed from Garrison to Jones. In consequence of this, he took depositions in *perpetuum rei memoriam*, to prove that the consideration of the deed to the son moved from the father. .

About the year 1807, Vattier, being largely indebted to Findley, transferred to him a large quantity of property, among which lot 86 was supposed to be included. It is understood that no money passed on this arrangement between Vattier and Findley, nor were the relations of the parties changed.

Findley examined into the title and became acquainted with its history from the recorder, T. Henderson. He determined to acquire the legal title from Garrison, which he did acquire at the price of \$700, and the conveyance of twenty-three feet, part of the lot, to the son of the vendor. The lot was then worth \$30,000.

In 1818, Findley and Vattier readjusted their affairs, and lot No. 86, so far as Findley retained the title, was reconveyed to Vattier. He sold to Lytle for \$15,000, who never paid any money; and the contract has been cancelled. The bill prays for a discovery and for a conveyance.

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The answer of Abraham Garrison acknowledges the sale and conveyance to William and Michael Jones, and the receipt of the purchase-money. He admits the receipt filed in the cause. He was induced to make the conveyance to Findley, by the assurance that the equitable title was already in him. He disclaims all title or interest, and prays to be dismissed.

The defendant, Garrison, having disclaimed all interest, and it appearing that he was a citizen of Illinois, and the defendants who purchased the twenty-three feet of land sold by Findley to Abraham Garrison, Jr., having filed their answers denying notice, and the plaintiffs admitting that notice could \*not be fixed on [ \*259 ] them; the court, with the consent of the plaintiff, decreed that the bill be dismissed as to them.

The answer of Charles Vattier states the amendment of the bill by which Garrison was made a party, and the subsequent dismissal of the bill as to him; wherefore he prays that the whole bill may be dismissed.

He does not admit that Belinda Bradford was the heir at law of James Bradford, or that she was born in lawful wedlock; nor does he admit the marriage of Thomas Doyle with the mother of the said Belinda, or the birth of T. Doyle, Jr.

He denies that the said Belinda was the heir of T. Doyle, Jr. He admits the conveyance of the lot from John Cleves Symmes, in 1795 to A. Garrison, and that some contract was made by Garrison with W. and M. Jones, and that W. and M. Jones sold their equitable title to T. Doyle, who took possession in his own right and not in right of his son. The consideration moved from the father; consequently, if the conveyance was made to the son, he held in trust for his father.

The deed from Jones was made, he says, to the son fraudulently, for the sole purpose of defrauding creditors. He denies that the father was indebted to the son. He denies that the lot lay open and unimproved. It was in possession of the defendant, who made some small improvements on it.

He obtained a judgment against the elder Doyle in February, 1801, upon which an execution issued, which was levied on lot 86. An inquest, summoned to ascertain the value of the premises, returned that Thomas Doyle was seised of lot No. 86, and that its clear yearly value was \$12. A writ of *venditioni exponas* was issued, which was stayed by *supersedeas*; but the judgment was affirmed; after which the lot was sold under execution, and the defendant, Vattier, became the purchaser. There having been lots sold on the same day, the sheriff conveyed to Mr. Barnet the lot sold to the defendant, and to

the defendant the lot sold to Mr. Barnet. The mistake was corrected by Mr. Barnet so far as his own interest was concerned, but was neglected by the defendant.

Some time after his purchase, he heard of the claim of young Doyle, and on being told by Jones that the purchase-money [ \*260 ] \*was paid by the father, he took depositions to perpetuate testimony

He denies that Belinda, the late wife of T. S. Hinde, was the heir of T. Doyle, Jr.

He admits that, upon a final settlement with Findley, the lot was reconveyed to him at the price of \$15,000. He also admits the sale to Lytle, and a reconveyance of the property, the purchase-money not having been paid.

The same defendant afterwards filed an amended answer, in which he states that, at the time of filing the original bill, Belinda Hinde, the plaintiff whose right was asserted therein, had no title to the lot 86. That on the 5th day of October, 1814, she, with her husband, Thomas S. Hinde, executed and delivered to Alexander Cummins, a deed of bargain and sale, whereby they conveyed the said lot to him in fee-simple, which deed was recorded in the court of Hamilton county, a copy of which is exhibited with the answer.

In their replication, the plaintiffs admit the execution of the deed set forth in the amended answer, but aver that if the deed was sufficient in law to transfer the estate of the said Belinda in the premises, which they do not admit, it was intended to vest the same in the said Alexander, in trust to reconvey the same to the said Thomas, to be held by him in trust for the use and benefit of the said Belinda and her heirs; and for this purpose the said Alexander did, on the 5th day of October, 1814, reconvey the said lot to the said Thomas. And afterwards, in March, 1815, did execute another deed for the same purposes, which last-mentioned deed was properly recorded in Hamilton county.

The defendants rejoin to this replication.

On a hearing, the court dismissed the bill as to Lytle and Findley, they appearing to have no interest in the premises; and decreed that Charles Vattier do, within sixty days, release to the plaintiffs so much of lot 86 as was conveyed to him by James Findley. From this decree the defendant, Charles Vattier, appealed to this court.

The counsel for the appellant assigns several errors in the decree.

The first is, that the court had no jurisdiction, the defendant, [ \*261 ] \*Garrison, being a citizen of the State of Illinois. He contends that, in suits between citizens of the United States, all the parties on one side must be citizens of the State in which the

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suit is brought; and that the jurisdiction of the court depends on the state of parties at the institution of the suit. In support of this proposition he cites *Mollan et al. v. Torrance*, 9 Wheat 537. In that case, a plea to the jurisdiction averred that the plaintiff and defendant are both citizens of the State of Mississippi. On demurrer, this plea was held ill, because the jurisdiction of the court depended on the state of the parties at the institution of the suit, and not at the time of the plea pleaded.

The same objection was made, and the same case cited in support of it, in *Connolly et al. v. Taylor et al.* 2 Pet. 556. In that case the court said, "where there is no change of party, a jurisdiction depending on the condition of the party is governed by that condition as it was at the commencement of the suit." But this principle was not supposed to be applicable to a suit brought by or against several individuals, whose names were struck out during its progress. In the case of *Connolly et al. v. Taylor et al.* the plaintiffs were aliens and a citizen of Pennsylvania. The defendants were citizens of the State of Kentucky, in which the suit was brought, except one, who was a citizen of Ohio. As between the citizen of Pennsylvania and of Ohio, the court, sitting in Kentucky, could exercise no jurisdiction. "Had the cause," said the court, "come on for a hearing in this state of parties, a decree could not have been made in it for the want of jurisdiction." The name of the citizen of the United States, who was originally a plaintiff, was, however, struck out before the cause came to a hearing, and the jurisdiction was sustained.

This case is, we think, in point. A decree between all the original parties could not have been made. Those plaintiffs who had a right to sue all the defendants, had in their bill united with themselves a person between whom and one of the defendants the court could not take jurisdiction. By striking out his name, the impediment was removed, and the jurisdiction between the other parties remained as it would have stood had his name never been inserted in the bill. The \*court could perceive no objection founded in [ \*262 ] convenience or in law to this course.

It is impossible to draw a distinction, so far as respects jurisdiction, between striking out the name of a plaintiff and of a defendant. The citizen of Ohio may have been a more necessary party in the cause than the citizen of Pennsylvania. Had it been otherwise, the same principle which sustained the one alteration would have sustained the other.

In the case of *Cameron v. M'Roberts*, 3 Wheat 591, John M'Roberts, a citizen of Kentucky, filed his bill in the court of the United States against Charles Cameron, a citizen of Virginia, and other

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defendants, without any designation of their citizenship. The defendants appeared and answered, and a decree was pronounced for the plaintiff. Upon a motion to set aside the decree, and to dismiss the suit for want of jurisdiction, the judges were divided in opinion on the following points, which was certified to this court:—

“Had the district court jurisdiction of the cause as to the defendant, Cameron, and the other defendants? If not, had the court jurisdiction to the defendant, Cameron, alone?”

The certificate of this court was, that if a joint interest vested in Cameron and the other defendants, the court had no jurisdiction over the cause. If a distinct interest vested in Cameron, so that substantial justice (so far as he was interested) could be done without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone.

The other defendants were represented, on the motion, to be citizens of Kentucky; but this is of no importance, since the jurisdiction of the court was as much affected by the omission to aver that they were aliens or citizens of some other State, as it would have been by the averment that they were citizens of Kentucky.

This certificate applies to the state of parties at the time of the decree, and affirms this principle. If the defendants have distinct interests, so that substantial justice can be done by decreeing for or against one or more of them, over whom the court has jurisdiction, without affecting the interests of the others, its jurisdiction may be exercised as to them.

If, then, when this cause came on for hearing, Abraham [ \*263 ] \* Garrison had still been a defendant, a decree might then have been pronounced for or against the other defendants, and the bill have been dismissed as to him, if such decree could have been pronounced as to them without affecting his interests.

We perceive no principle of reason or law which opposes this course. The incapacity of the court to exercise jurisdiction over Garrison could not affect their jurisdiction over other defendants whose interests were not connected with his, and from whom he was separated by dismissing the bill as to him.

The second error assigned is attended with more difficulty. It is, that Abraham Garrison is a necessary party, without whom a decree ought not to be made. This objection derives additional force from the fact that the former decree was reversed because he had not been made a party. Did the case now appear under precisely the same circumstances as at the former hearing, the same decree would undoubtedly be now pronounced. But it is insisted by the counsel for the appellants, that circumstances have so changed as to require a

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different decision. It did not appear in the record, as formerly brought up, that Garrison was not within the jurisdiction of the court. This circumstance is undoubtedly entitled to great consideration, and has always received it. It is the settled practice in the courts of the United States, if the case can be decided on its merits between those who are regularly before them, to decree as between them. Although other persons, not within their jurisdiction, may be collaterally or incidentally concerned, who must have been made parties had they been made amenable to its process, this circumstance shall not expel other suitors who have a constitutional and legal right to submit their case to a court of the United States, provided the decree may be made without affecting those interests.

In the case of *Osborn et al. v. The Bank of the United States*, 9 Wheat. 738, this point was made and relied on by the appellants. A tax had been imposed by the legislature of Ohio on the Bank of the United States, which had been forcibly levied by the officer employed to collect it. A bill was filed against this officer, and against the auditor and treasurer of the State, praying that the money might be restored to the bank, the act imposing the tax being unconstitutional. The \*process was served while the money [ \*264 ] was yet in the hands of the officer. The court decreed the restoration of the money, and the defendants appealed. The appellants insisted that the State of Ohio was the party really interested; that the treasurer, auditor, and collecting officer were its agents; and that no decree could be made unless the principal could be brought before the court.

This court admitted the direct interest of the State, and added, "had it been within the power of the bank to make it a party, perhaps no decree ought to have been pronounced in the cause until the State was before the court. But this was not in the power of the bank." The jurisdiction of the court was sustained, and the decree affirmed.

This is a stronger case than that under consideration. The money in contest would have been paid into the treasury of the State, had the bill been dismissed for want of proper parties. The decree arrested the money in its progress to the treasury, and restored it to the bank. All must admit that the State ought to have been made a party, had it been amenable to the process of the court. Yet this direct interest did not restrain the court from deciding the merits of the cause between the parties before it.

In the case at bar, Abraham Garrison has no claim, legal or equitable, to the property in contest. No decree could be made against him, and he has filed his answer disclaiming all interest in the cause. It is true that his answer is not evidence as an answer, since the

court had no jurisdiction as to him. But in a question concerning himself only; in a question whether the court will abstain from exercising its jurisdiction between parties, in some of whom the whole title in law and equity is vested, lest his interests should be affected; his disclaimer of all interest, appearing in the form in which it appears, cannot be disregarded.

. The rule that the court will proceed, although persons interested are not parties, if those persons are not within its jurisdiction, has been adopted also by the court of chancery in England. There, as here, the general rule is that "all persons materially interested in the subject ought to be parties, in order to prevent a multiplicity of suits, and that there may be a \*complete decree between all parties having material interests; but this being a general rule, established for the convenient administration of justice, is subject to some exceptions, introduced from necessity, or with a view to practical convenience. " Thus," continues Mr. Maddock, (vol. 2, p. 142,) "where persons interested are out of the jurisdiction of the court, and it is stated so in the bill and proved, it is not necessary to make them parties."

Had the case on the former hearing appeared as it now appears; had it been then known as it is now known, that making Garrison a party would turn the plaintiffs out of court, and that he disclaimed all interest in the cause; had these facts appeared in the former record, we think the decree would not have been reversed for the cause assigned for its reversal. We are, therefore, of opinion that the court committed no error in making their decree between the remaining parties, after the bill had been dismissed as to Abraham Garrison.

These preliminary objections being removed, we proceed to consider the rights of the parties.

A question has been made respecting the admissibility of a great part of the testimony on which these rights depend.

Before the original decree was made, while the cause was depending in the circuit court, the parties, by their counsel, filed a consent in writing for the admission of all the testimony which had been taken in several suits which were depending between some of the same parties, relative to the same controversy, in all the suits, both in law and equity. Under this agreement, all the depositions were read without objection at the hearing of the cause. When the decree then pronounced was reversed, and the cause remanded, the counsel for Vattier objected to such of the depositions as were not regularly taken; and now allege, in support of the objection, that the consent was no longer binding. That the order to proceed *de novo* was

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equivalent in effect to dismissing the bill without prejudice, and that new parties are brought into the cause.

The only really new party was Abraham Garrison, and the testimony was never used for or against him. The bill, as to him, was dismissed before the cause came to a hearing. The \*new parties plaintiffs are the representatives of Belinda [ \* 266 ] Hinde, an original plaintiff, and the proceedings are revived in their names by the order of the court on their bill of revivor. Under such circumstances, the settled practice is to use all the testimony which might have been used had no abatement occurred. The representatives take the place of those whom they represent, and the suit proceeds in its new form, unaffected by the change of name.

The reversal of the original decree cannot annul the written consent of parties for the admission of testimony. That consent was not limited in its terms to the first hearing, but was coextensive with the cause. The words in the decree of reversal, that the parties may proceed *de novo*, are not equivalent to a dismissal of the bill without prejudice; nor could the court have understood them as affecting the testimony in the cause, or as setting aside the solemn agreement of the parties. The testimony, therefore, is still admissible to the extent of that agreement.

As the appellees claim under Thomas Doyle, Jr., the first inquiry is into the validity of his title.

It is derived, as is stated in the original bill, from Abraham Garrison, who sold to William and Michael Jones. This sale is proved by the receipt given for the purchase-money, which receipt also contains a stipulation for a conveyance.

An objection is made to its admission in evidence, because it has not been proved by the subscribing witness. Some affidavits were filed, which state that, after diligent inquiries at his former place of residence, no intelligence could be obtained respecting him, nor had he been heard of for many years. These affidavits are also objected to, because not regularly taken on notice.

The validity of this objection need not be examined, because the receipt is more than thirty years old, and is not only free from suspicion, but is supported by other testimony. In such a case the subscribing witness may be dispensed with. Bul. Nisi Prius, 255; 1 Starkie's Law of Evidence, 342. This paper vests an equitable title in William and Michael Jones. The bill alleges that a deed in pursuance of it was soon afterwards executed, and there is much reason to believe that the \*allegation is true; but the [ \* 267 ] deed is lost, and the proof of its existence is not thought sufficient to establish it.

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In March, 1800, a deed was executed by William Jones, for and on behalf of his partner, Michael, and himself, conveying the lot 86 to Thomas Doyle, Jr.

The appellants insist that this deed is fraudulent; that the consideration moved from Thomas Doyle the father; and that the conveyance was made at his instance to his son, then an infant, for the purpose of protecting the property from the creditors of the father, who was then insolvent.

The appellees insist that the money paid was in truth the money of the son then in the hands of the father, and that the transaction was a fair one. They admit that Thomas Doyle, Sen., was indebted, but not insolvent. The bill states that the money of the son came to the hands of his father in the following manner:—

John Bradshaw, the intimate friend and brother officer of Thomas Doyle, being an old bachelor, without near relations, executed a voluntary bond to the son of his friend, for 250 acres of valuable land, part of a larger tract, which he deposited with the father for the use of the son. This statement is corroborated by the will of Bradshaw, in which he gives the residue of the land and all his other property to Thomas Doyle. What is denominated a bond, is in substance a deed poll. It describes the tract of land, of which the 250 acres it purports to convey are a part; and then, for a valuable consideration, bargains and sells the said 250 acres to Thomas Doyle, Jr., son of Major Thomas Doyle, a major in the service of the United States. This bond or deed is attested by two witnesses, and bears date the 7th day of January, 1794. The handwriting of one of the subscribing witnesses, who is dead, is proved; and a witness testifies that he has heard nothing concerning the other, though he has made inquiry for him. The handwriting of Bradshaw is also proved.

On the 17th of May, 1796, Thomas Doyle, the father, made the following assignment of this instrument: "In consideration of \$400 to me in hand paid, I sign over in behalf of my son, Thomas [ \* 268 ] Doyle, Jr., my right and title to the within \* mentioned tract of land, and obligate myself in the penalty of \$600, that when he becomes of sufficient age, that he will sign over his right and title of the same, agreeable to law." Signed, Thomas Doyle. 'The payment of the consideration money specified in the assignment is proved.

Thomas Doyle then was, in May, 1796, indebted to his son, for money received to his use, in the sum of \$400. Although the son might, when of age, have refused to receive this money, and have asserted his title to the 250 acres, had the tract of which it was a part remained the property of his father, the devisee of Bradshaw, or

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of a purchaser with notice, yet he was not compellable to assert it and, his title not being on record, he could not have asserted it against a purchaser without notice. Thomas Doyle, the son, then was a *bona fide* creditor of his father, for the sum of \$400. The circumstances under which this debt was created, or the relationship between the parties, cannot render it less sacred.

In March, 1800, Thomas Doyle, being thus indebted to his son directed the conveyance of lot No. 86 to be made to him, declaring, at the time, that it was made in consideration of the debt he owed for his son's land sold to Vance. Had this transaction been in favor of any other creditor than a son, its fairness could never have been impeached. Had he, as guardian for any other person, secured a debt under the same circumstances, the helpless infancy of the ward would not have tainted the transaction with fraud. The connection between the parties may excite suspicion, may justify a more scrutinizing investigation of all the circumstances; but if the result of this investigation be, as we think it is, that the conveyance was in payment of a debt of the most sacred obligation, a debt which a conscientious debtor ought to have paid, it is valid in law. The consideration mentioned in the deed is \$350, and it is not suggested that the lot was worth more than that sum.

This deed could pass only the interest of William Jones. But it purported to convey the interest of both partners. The presumption arising from the language of the deed and the connection between the parties, that the land was considered as [ \* 269 ] an article of merchandise, and supposed to be conveyed as such an article, is strengthened if not confirmed by the deed of confirmation afterwards made by Michael Jones, the other partner and joint owner of the lot, and by his deposition, which states that the purchase was made by William, the acting partner, who directed the conveyance to be made to the firm.

This being the title of Thomas Doyle, Jr., we are next to inquire whether it has descended on Belinda, the plaintiff in the original suit, and his sister on the part of the mother.

The plaintiffs make two objections to her title.

I. That she was not born in lawful wedlock, and was therefore incapable of taking lands by descent.

II. That if legitimate, she could not inherit this from her half-brother; because she is not of the blood of the first purchaser.

1. Belinda was the daughter of James and Margaret Bradford. Several witnesses testify that they lived together as man and wife, acknowledged each other in that character, and were reputed to be lawfully married. The will made by Mr. Bradford, after being mor-

tally wounded, bequeathes one half of his estate to his wife, Margaret Bradford, "now pregnant," and the other half to his child "of which" she was then pregnant.

To this testimony the appellant opposes some rumors that they were married by a military officer, a person not authorized to perform the ceremony.

We cannot hesitate on this question. Belinda Bradford, the child mentioned in the will of her father, must unquestionably be considered as legitimate.

2. It is alleged that she could not inherit this lot, unless Thomas Doyle Jr. died before the enactment of a law which limited the inheritable capacity of the half blood to the blood of the first purchaser; and the appellants insist that this fact is not proved.

The court has not inquired into it, because Thomas Doyle, Jr., is himself the first purchaser, and may transmit the lot to his half-sister, whether on the part of the father or mother. The plaintiff, Belinda, then succeeds to all the right of Thomas Doyle, Jr., in the lot in controversy.

[ \* 270 ] \* We are next to inquire how those rights are affected by the title of the appellants.

Charles Vattier, the appellant, claims under a sale made in 1802, by the sheriff of Hamilton county, by virtue of an execution issued on a judgment obtained against Thomas Doyle, which he says was levied on lot No. 86. At this sale, he alleges that he was the highest bidder, and, as such, became the purchaser. The sheriff made the deed on the 14th of July, 1828. The consideration expressed, is \$90.

The appellees do not admit the fact that this lot was really sold as the property of Thomas Doyle. The testimony, which would seem to be conclusive, that this lot was sold as alleged by Vattier, is repelled by circumstances of great weight. But, admitting this fact to be completely established, its influence in the cause is countervailed by the circumstances that Thomas Doyle had no semblance of title in law or equity to the lot on which the execution was levied. The deed of William Jones, in the name of William and Michael Jones, conveying the lot to Thomas Doyle, Jr., was recorded in March, 1800. If persons were not bound to notice this deed because the title of Jones did not appear on the record, still, there was no trace of title from any person whatever to Thomas Doyle. This sale, then, was totally unauthorized, and could convey nothing. No title being in Vattier, he could convey none to Findley. If then, at any time before the deed from Garrison to Findley, a controversy had arisen respecting the title to this lot between the heirs of Thomas Doyle, Jr., and Charles Vattier or his vendee, each claiming a conveyance

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of the legal title, the decision must have been in favor of Doyle's heirs. They had, if not the legal right, a complete equitable title, to which no single objection could be made.

Was the conveyance from Garrison to Findley made under circumstances which ought to defeat this title?

Charles Vattier having become largely indebted to James Findley, this lot, with other property, is said to have been transferred to him in 1807, in part satisfaction of the debt. The conveyance, if any was made, is not adduced; nor have we any satisfactory evidence, if one was made, that it included this lot. It is not pretended that any money was paid in consequence \* of this [ \* 271 ] arrangement. Some considerable time after it, Findley, having become fully apprised of the defect in his title, and of the conveyance to Thomas Doyle, Jr., applied to Garrison, and, in 1815, obtained a conveyance from him. He afterwards conveyed this property to Vattier. If Vattier can now be deemed a purchaser without notice, his title cannot be disturbed.

It is not alleged that either Vattier or Findley was without knowledge of the rights of the appellees when the legal title was acquired. It is contended that they acquired the property and paid the purchase-money without this knowledge, and might therefore conscientiously protect themselves by getting in the legal estate.

Let this allegation be examined.

In 1802, Vattier purchased the title of Thomas Doyle, the elder, who had no title whatever. Whether he knew that a conveyance had been made to Thomas Doyle, the younger, or not, is immaterial. He could acquire nothing. The principle *caveat emptor* is completely applicable.

The rules respecting a purchaser, without notice, are framed for the protection of him who purchases a legal estate and pays the purchase-money without knowledge of an outstanding equity. They do not protect a person who acquires no semblance of title. They apply fully only to the purchaser of the legal estate. Even the purchaser of an equity is bound to take notice of any prior equity. Vattier's original purchase, then, cannot avail him, because he was bound to notice the equity of Doyle. But there is, we think, much reason to believe that he had actual notice of that equity; or at any rate, was informed of circumstances which ought to have led to such inquiry as would have obtained full notice.

The title of Garrison, under whom Doyle was supposed to claim, is presumed by the law to have been known to Vattier. He ought to have inquired into it. In his answer, he says "he has been informed and believes that some kind of a contract was made by the

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said Abraham Garrison with William and Michael Jones for the sale, to them, of the lot aforesaid." He does not state the time when this information was obtained, nor is there any reason to [ \* 272 ] believe that it was subsequent to his \* purchase. He also admits his information and belief that W. and M. Jones sold their right to Thomas Doyle the elder, who paid them the full consideration for the same, and took in his own right, and in the right of his son. He does not say when this information was obtained. He says he had no other knowledge of the title of Thomas Doyle to the lot than its being called his, and being sold as his. These circumstances lead to the opinion that this information was received anterior to his purchase.

In so small a society as was then settled in Cincinnati, it is not probable that the title of Thomas Doyle the son, which was of record, should have been unknown. It would, most probably, be the subject of conversation. But be this as it may, a purchaser was bound to make inquiries from Garrison. Had the lot been sold as the property of Garrison, full notice of the equity of Jones and of Doyle would be required to defeat the rights of the purchaser ; but, being sold as the property of Thomas Doyle, Sen., the purchaser was bound to inquire into his title. In making these inquiries, Vattier, if he then possessed a knowledge of the sale to Jones, (and if he did not, he ought to have been more explicit in his answer,) should have searched for a conveyance from Jones to Doyle. He must have found one from Jones to Thomas Doyle, Jr. Under these circumstances, Vattier ought to have taken notice of the prior equity of Doyle. If he did not, he is chargeable with negligence.

But it has been argued, that Findley purchased what he supposed to be a legal title, and might protect himself after discovering his mistake.

Several answers have been given to this argument.

The lot was understood to have been sold as the property of Thomas Doyle, Sen., and the sheriff's deed to Vattier stated it to be sold as the property of John C. Symmes, under an execution against him. Symmes had no title. If it was actually sold as the property of T. Doyle, Sen., he could show no semblance of title. James Findley, therefore, was bound to know that he received from Vattier a property to which the vendor had no other right than was given by possession. He was consequently bound to take notice [ \* 273 ] of all existing equities, and \* could not maintain his possession against them. Had he been about to make a purchase, he must have examined the title of Vattier, and must have discovered that he had none. Upon such examination, the deed from Jones could scarcely have escaped his notice.

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Findley had paid no money for the lot. The character of the transaction between Vattier and himself is not explained. A new arrangement of all their affairs appears to have taken place, by which this lot was returned. Previous to this new arrangement, he had full notice of the title of the appellees, and with this notice purchased from Garrison at a great undervalue. It is not alleged, nor can we presume that he was driven to this purchase as the only refuge to protect himself from loss. Had such an allegation been made, it would require an examination of the contract and transactions between himself and Vattier; but it is not made.

Upon a full consideration of all the circumstances under which Findley bought from Garrison, we cannot consider him as entitled to that protection which a court of equity affords to a man who purchases a legal title and pays the purchase-money, without notice of an equity existing against the property which had been sold to him. At the time of acquiring the legal title, he had full notice of the equity of the appellees; and we do not think he has shown himself to have been placed in a situation which would justify his procuring a conveyance from Garrison. If he was not himself protected against the equity of Doyle's representatives, he could communicate no protection to Vattier, who had himself full notice.

The conveyance to Lytle, and the reconveyance from him cannot affect the case, because no money was paid.

If, then, the case of the appellees had been correctly stated in their bill, we should have thought them entitled to the relief for which they prayed. But it was not correctly stated. The bill sets forth a title in Belinda, the wife of Thomas S. Hinde, by direct descent from her brother to herself, and insists on this title.

The answer resists the claim, because the land had been conveyed by the plaintiffs, before the institution of \*their [ \* 274 ] suit, to Alexander Cummings. The plaintiffs, in their replication, admit the execution of the deed to Cummings, but aver that it was made in trust to reconvey the same rights to the said Thomas, to be held by him in trust for the use and benefit of the said Belinda and her heirs, and to enable the said Thomas the more conveniently to manage, litigate, and protect the said rights; and that the said Alexander Cummings did afterwards, in execution of the said trust, make a deed to the said Thomas, which is recorded in the proper county. The deed referred to is exhibited, but expresses no trust for the wife and her heirs.

Will the rules of the court of chancery permit this departure in the replication from the statements of the bill?

It is well settled that a decree must conform to the allegations of

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the party, as well as to his proofs. The answer, supported as it is by the deed to Cummings, would have put the plaintiffs out of court, had they not made a new case in their replication. Ought not this case to have been made in their bill, and can the omission to make it be supplied by averments in the replication?

The act for regulating processes in the courts of the United States, vol. 2, p. 299,<sup>1</sup> enacts, that "the forms and modes of proceedings" in courts of equity and in those of admiralty and maritime jurisdiction, shall be "according to the principles, rules, and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law;" subject, however, to such alterations, &c.

This act has been generally understood to adopt the principles, rules, and usages of the court of chancery of England. By the principles, rules, and usages of that court, the plaintiffs, in such a case as this, must have amended their bill. 2 Mad. Ch. 275, 286; Mitf. Pl. 256. They could not have been permitted to make a new case in their replication.

The act permits this court to prescribe rules for the practice of the circuit courts. Rules have been prescribed in pursuance of this power, but they allow a special replication to be filed only with leave of the court. This replication was filed without leave, and is consequently not saved by the rule. We think it obviously proper

that the real case should have been stated in the bill, and [ \* 275 ] that the decree ought not to have been pronounced in the actual state of the pleadings. For this fault we are of opinion that the decree ought to be reversed, and the cause remanded, with directions to permit the plaintiffs to amend their bill.

10 P. 177; 5 H. 441; 17 H. 180.

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CHARLES A. DAVIS, CONSUL-GENERAL OF THE KING OF SAXONY,  
Plaintiff in Error, v. ISAAC PACKARD, HENRY DISDIER, and WIL-  
LIAM MURPHY, Defendants.

7 P. 276.

On a writ of error to a state court, the record of which was understood to show that the character of consul-general of the king of Saxony did not exempt the defendant from being sued in the state court, the judgment was reversed.

This is not a mere personal privilege. It is a privilege of the foreign sovereign, that his representative shall be sued only in the courts of the United States, with which government alone he has relations; and it is not waived by an omission to plead it to the action.

Debt on a recognizance of bail, is an original action, and need not be brought in the court in which the judgment was rendered.

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<sup>1</sup> 1 Stats. at Large, 276.

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THE case is stated in the opinion of the court.

*White*, for the plaintiff.

*Sedgwick*, contra.

THOMPSON, J., delivered the opinion of the court.

\* The writ of error in this case brings up for review, a [ \* 281 ] judgment recovered against the plaintiff in error in the court for the correction of errors, in the State of New York. The case was before this court at the last term, (6 Pet. 41,) on a motion to dismiss the writ of error for want of jurisdiction. This court sustained its jurisdiction under the 25th section of the Judiciary Act, on the ground that the decision in the state court was against the exemption set up by the plaintiff in error; namely: that he, being consul-general of the king of Saxony in the United States, the state court had not jurisdiction of the suit against him. The principal difficulty in this case seems to grow out of the manner in which the exemption set up by the plaintiff in error, was brought under the consideration of the state court, and in a right understanding of the ground on which the court decided against it.

As an abstract question, it is difficult to understand on what ground a state court can claim jurisdiction of civil suits against foreign consuls. By the constitution, the judicial power of the United States extends to all cases affecting ambassadors, other public ministers, and consuls, &c. And the Judiciary Act of 1789, (2 Laws U. S. § 9,<sup>1</sup>) gives to the district courts of the United States, exclusively of the courts of the several States, jurisdiction of all suits against consuls and vice-consuls, except for certain offences mentioned in the act. The record sent up with the writ of error in this case, shows that the suit was commenced in the supreme court of the State of New York; and that the plaintiff in error did not plead or set up his exemption in that court; but on the cause being carried up to the court for correction of errors, this matter was assigned for error in fact; notwithstanding which the court gave judgment against the plaintiff in error.

It has been argued here, that the exemption might have been excluded by the court for the correction of errors, on the ground that it was waived by not having been pleaded in the supreme court. It is unnecessary to decide definitively whether, if such had been the ground on which the judgment of the state court rested, it would

take the case out of the revising power of this court under the 25th section of the Judiciary Act; for we cannot say, judging [ \* 282 ] from the record, that the judgment turned on this point; but on the contrary, we think the record does not warrant any such conclusion.

It has been repeatedly ruled in this court, that we can look only to the record to ascertain what was decided in the court below. The question before this court is, whether the judgment was correct, not the ground on which that judgment was given. And it is the judgment of the court of errors, and not of the supreme court, with which we have to deal.

Looking, then, to the record, we find that when the cause went up upon a writ of error from the supreme court, to the court for the correction of errors, it was assigned as error in fact, that Charles A. Davis, before and at the time of commencing the suit against him, was, and ever since has continued to be, and yet is, consul-general of his Majesty the king of Saxony, in the United States, duly admitted and approved as such by the President of the United States.

The record shows no objection to the time and place, when and where this matter was set up, to show that the supreme court of New York have not jurisdiction of the case. The only answer to this assignment of errors is, that there is no error in the record and proceedings aforesaid, nor in the giving the judgment aforesaid, because it nowhere appears by the record, proceedings, or judgment, that the said Charles A. Davis ever was consul of the king of Saxony.

This was no answer to the assignment of errors. It was not meeting or answering the matter assigned for error. It is not alleged in the assignment of errors that it does appear, by the proceedings or judgment in the supreme court of New York, that Charles A. Davis was consul of the king of Saxony.

Matter assigned in the appellate court, as error in fact, never appears upon the record of the inferior court; if it did, it would be error in law.

Suppose infancy should be assigned as error in fact; would it be any answer to say that it nowhere appeared by the record that the defendant in the court below was an infant.

The whole doctrine of allowing in the appellate court the assignment of error in fact, grows out of the circumstance that such matter does not appear on the record of the inferior court.

But the answer to the assignment of errors prays that the [ \* 283 ] \* court for the correction of errors may proceed to examine

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the record and proceedings aforesaid, and the matters aforesaid above assigned for error.

Under this informal state of the pleadings in the court for the correction of errors, how is this court to view the record? The most reasonable conclusion is that the court disregarded matters of form, and considered the answer of the defendants in error as a regular joinder in error. And this conclusion is strengthened when we look at the form of the entry of judgment. "Whereupon the said court for the correction of errors, after having heard the counsel for both parties, and diligently examined and fully understood the causes assigned for error," &c., affirms the judgment.

The only cause assigned for error was that Charles A. Davis, was consul-general of the king of Saxony; and the conclusion must necessarily follow that this was not, in the opinion of the court, a sufficient cause for reversing the judgment. If it had been intended to say it was not error, because not pleaded in the court below, it would probably have been so said. Although this might not perhaps have been strictly technical, yet as the court gave judgment on the merits, and did not dismiss the writ of error, it is reasonable to conclude that the special grounds for deciding against the exemption set up by the plaintiff in error, would have been in some way set out in the affirmance of the judgment.

If any doubt or difficulty existed with respect to the matters of fact set up in the assignment of errors, the court for the correction of errors was, by the laws of New York, clothed with ample powers to ascertain the facts.

The statute (2 Laws N. Y. 601) declares, "that whenever an issue of fact shall be joined upon any writ of error returned into the court for the correction of errors, and whenever any question of fact shall arise upon any motion in relation to such writ or the proceedings thereon; the court may remit the record to the supreme court, with directions to cause an issue to be made up by the parties to try such question of fact, at the proper circuit court or sittings; and to certify the verdict thereupon to the court for the correction of errors."

\* No such issue having been directed, we must necessarily [ \* 284 ] conclude that no question of fact was in dispute; and as the record contains no intimation that this matter was not set up in proper time, the conclusion would seem irresistible that the court for the correction of errors considered the matter itself, set up in the assignment, as insufficient to reverse the judgment. This being the only question decided in that court, is the only question to be reviewed here; and viewing the record in this light, we cannot but consider the judgment of the state court in direct opposition to the act of con-

gress, which excludes the jurisdiction of the state courts in suits against consuls.

But if the question was open for consideration here, whether the privilege claimed was not waived by omitting to plead it in the supreme court, we should incline to say it was not. If this was to be viewed merely as a personal privilege, there might be grounds for such a conclusion, but it cannot be so considered. It is the privilege of the country or government which the consul represents. This is the light in which foreign ministers are considered by the law of nations, and our constitution and law seem to put consuls on the same footing in this respect.

If the privilege or exemption was merely personal, it can hardly be supposed that it would have been thought a matter sufficiently important to require a special provision in the constitution and laws of the United States. Higher considerations of public policy doubtless led to the provision. It was deemed fit and proper that the courts of the government, with which rested the regulation of all foreign intercourse, should have cognizance of suits against the representatives of such foreign governments. That it is not considered a personal privilege in England, is evident from what fell from Lord Ellenborough, in the case of *Marshall v. Critico*, 9 East, 447. It was a motion to discharge the defendant from arrest on common bail on the ground of his privilege under the statute 7 Ann, c. 12, as being consul-general from the Porte. Lord Ellenborough said, this is not a privilege of the person, but of the state he represents, and the defendant having been divested of the character in [ \* 285 ] \* which he claims that privilege, there is no reason why he should not be subject to process as other persons; and the motion was denied on this ground.

Nor is the omission to plead the privilege deemed a waiver in England, as is clearly to be inferred from cases where application has been made to discharge the party from execution, on the ground of privilege under the statute of Ann, which is considered merely as declaratory of the law of nations; and no objection appears to have been made, that the privilege was not pleaded. 3 Burr. 1478, 1676.

It may not be amiss barely to notice another argument which has been pressed upon the court by the counsel for the defendants in error, although we think it does not properly arise upon this record.

It is said the act of congress does not apply to this case, because, being an action upon a recognizance of bail, it is not an original proceeding, but the continuation of a suit rightfully commenced in a state court.

The act of congress is general, extending to all suits against con-

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suls; and it is a little difficult to maintain the proposition that an action of debt upon recognizance of bail is not a suit.

But we apprehend the proposition is not well founded; that it is not, in legal understanding, an original proceeding.

It is laid down in the books, that a *scire facias* upon a recognizance of bail is an original proceeding, and if so, an action of debt upon the recognizance is clearly so. A *scire facias* upon a judgment is, to some purposes, only a continuation of the former suit; but an action of debt on a judgment is an original suit.

It is argued that debt on recognizance of bail, is a continuation of the original suit, because, as a general rule, the action must be brought in the same court. Although this is the general rule, because that court is supposed to be more competent to relieve the bail when entitled to relief, yet, whenever from any cause the action cannot be brought in the same court, the plaintiff is never deprived of his remedy, but allowed to bring his action in a different court, as where the bail moves out of the jurisdiction of the court. This is the settled rule in the State of New York; and it is surely a good reason for bringing \* the suit in another court, when [ \* 286 ] the law expressly forbids it to be brought in the same court where the original action was brought. 2 Wil. Saund. 71, a; Tidd's Practice, 1099, 6th ed.; 2 Archb. Prac. 86, book 3, c. 3; 7 Johns. 318; 9 Johns. 80; 12 Johns. 459; 13 Johns. 424; 1 Chit. 713; 18 Common Law, 212, n. a.

But the reversal of the judgment in this case is put on the ground that, from the record, we are left to conclude that the court for the correction of errors decided that the character of consul-general of the king of Saxony, did not exempt the plaintiff in error from being sued in the state court.

*Judgment reversed*

14 P. 614; 9 H. 372.

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UNION BANK OF GEORGETOWN v. GEORGE B. MAGRUDER.

7 P. 287.

Whether certain declarations by the indorser of a note amounted to a waiver of demand on the maker and notice to the defendant, or to a new promise in consideration of forbearance, are questions of fact for the jury, under instructions from the court, not mere questions of law.

ERROR to the circuit court for the county of Washington in the District of Columbia.

The case is stated in the opinion of the court.

*Key*, for the plaintiffs in error.

*Coxe*, contra.

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STORY, J., delivered the opinion of the court.

This cause was formerly before the court upon a writ of error to the circuit court of the District of Columbia, sitting for the county of Washington. The judgment then rendered was reversed, (*Magruder v. Union Bank of Georgetown*, 3 Pet. 87,) and a *venire facias de novo* awarded; upon which a new trial having been had, the cause is again before us upon a bill of exceptions taken by the plaintiffs at the last trial.

The action is brought by the plaintiffs, as indorsers, to recover the contents of a promissory note made on the 8th of November, 1817, by George Magruder, deceased, whereby he promised, seven years after date, to pay to George B. Magruder, the defendant, \$643.21, with interest, for value received, and which was indorsed before it became due by the defendant to the plaintiffs.

[ \* 288 ] \*There are several counts in the declaration. The first is founded on the liability of the defendant as indorser, and avers that the maker of the note died before the note became due, and the defendant took administration on his estate, and after the note became due, to wit, on the 11th day of November, 1824, due demand of payment was made of the defendant, as administrator, who refused to pay the same, and, having due notice, became liable to pay the same. The second count alleges, that when the note became due, the same not having been demanded of the maker, nor protested for non-payment, and notice not having been given to the defendant, (the defendant being before, and when the same became due, the administrator of the maker,) and the defendant, well knowing that the same had not been paid, afterwards, on the 15th of November, 1824, in consideration thereof, and in further consideration that the plaintiffs would not bring suit on the note against him as indorser, but would give time to him for the payment thereof, (not saying for what time, or for a reasonable time,) the defendant promised that he would ultimately, and in a reasonable time, pay the same to the plaintiffs. Then follow the common money counts.

The bill of exceptions is in the following words:—

"In the trial of this cause, the plaintiffs, to support the issues on their part, offered a competent witness, Alexander Ray, who proved, that two or three days after the note fell due, he had a conversation with defendant; asked him if he could arrange the note; that if he did not, probably the officers of the bank would be blamed; he said no officer should lose any thing by him, and that there was some property on Cherry street, which witness understood that George Magruder, in his lifetime, owned; that he would repair it, and that

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it would become valuable. Mr. Thompson had had a previous conversation with him; the defendant had not been informed by me that the note was overdue, and not demanded. Also, James Thompson, who proved that, as soon as it was discovered that the note was over, he and the cashier conversed about it; and about three or four days after it was overdue, he determined to call on defendant, and request him to arrange it, and state "the circumstances attending the note; that he then called [ \*289 ] on defendant, and found him from home; left word he wanted him, and a day or two after defendant called at bank; he went aside with him, told him the circumstances attending the neglect in relation to the note, and requested him to take time and determine what he would do as to arranging the note; telling him that he did not wish defendant to say a word to him to commit himself, but to consider whether, if he did not arrange it, the bank might not do him a greater injury than the amount of the note; that some time after this conversation, he had another with defendant; that the defendant asked him, if the debt was lost, whose loss would it be; would it fall on any of the officers of the bank? Witness replied that he did not know how that would be; that he could not answer that question; that the bank would, perhaps, look to the officers; and the defendant then said, no officer of the Union Bank should lose any thing by him. That he afterwards had another conversation with defendant in Mr. Wharton's store; that defendant said, 'he meant to pay the note, but would take his own time for it; that he would not put himself in the power of the bank.' He thinks this last conversation was about three or four months after the note fell due. That just before the suit was brought, the witness was desired, by the president of the bank, to call on the defendant, and know what he meant to do with the note; that he did so, and that defendant then said, 'I will pay that note now, if the bank will take the house on Cherry street for what it cost me.' Witness reported the answer to the president, who said the bank did not want the house, and shortly afterwards suit was brought. Plaintiffs further proved that the defendant, when the note fell due, and before, was administrator of the drawer of the note, George Magruder, who had died before the note fell due, and who, it is also admitted, was insolvent.

"Whereupon the plaintiffs, on the foregoing evidence, prayed the court to instruct the jury as follows:—

"That if the jury believe the defendant held the above conversations as stated by the witnesses, such conversations amount to a waiver of the objection of the want of demand and notice; and

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the defendant is liable on the note, if the jury should [ \* 290 ] \*believe that the defendant made the acknowledgments and declarations stated in the conversations in reference to the claim of the bank upon him, as indorser of the note ; which the court refused.

" And the plaintiffs then prayed the court to instruct the jury as follows :—

" That if the jury believe, from the evidence aforesaid, that the defendant, after knowing of his discharge from liability as indorser of the said note, by the neglect to demand and give notice, said, 'that he meant to pay the note, but should take his own time for it, and would not put himself in the power of the bank,' and that the bank forbore bringing suit, from the time of said conversation, about three or four months after the note fell due, until the date of the writ issued in this cause, then the plaintiffs are entitled to recover on the second count of the declaration, which, also, the court refused to give ; to which refusal to give the said instructions, the plaintiffs excepted."

The question is whether these instructions, thus propounded, were rightly refused by the court. And we are of opinion that they were. The first requests the court to instruct the jury upon a mere matter of fact, deducible from the evidence, and which it was the proper province of the jury to decide. It asks the court to declare that the conversations stated (sufficiently loose and indeterminate in themselves) amounted to a waiver of the objection of the want of demand and notice. Whether these did amount to such a waiver, was not matter of law but of fact ; and the sufficiency of the proof for this purpose was for the consideration of the jury.

The second instruction is open to the same objection. It calls upon the court to decide upon the sufficiency of the proof ; to establish that there was a forbearance by the plaintiffs to sue the defendant upon the note, and of the promise of the defendant, in consideration of the forbearance, to pay the same. That was the very matter upon which the jury were to respond, as matter of fact. It is also open to the additional objection, that it asks the court to decide this point, not upon the whole evidence, but upon a single sentence of the conversations stated, without the slightest reference to [ \* 291 ] the manner in which \*the meaning and effect of that sentence was, or might be controlled by the other points of the conversations, or the attendant circumstances. In either view it was properly refused.

The court have also been called upon to review their former decision in this case. 3 Pet. 87. To this it might be a sufficient

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answer to say that no case is made out upon the record, calling for such a review; and, if it were, we are entirely satisfied with that decision.

The judgment of the circuit court is therefore affirmed, with costs.

10 P. 572; 20 H. 496.

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**JOSEPH SHAW, Plaintiff in Error, v. JOSEPH COOPER.**

7 P. 292.

An alien patentee made an invention in England, and came to this country in 1817; his invention was fraudulently disclosed in England, and went into public use there, and also in France, in 1820; the patentee knew of this use, but neglected to apply for a patent until 1822; the court below instructed the jury that the patentee had slept too long on his rights to be entitled to the benefit of a patent under the act of April 17, 1800, (2 Stats. at Large, 37.) *Held*, this instruction was correct.

If a patent was surrendered for a defective specification, before any act of congress on the subject, the rights of the patentee must be tested by the law as it stood when the original patent was issued.

Whatever may be the intention of the inventor, if he suffer his invention to go into public use, by any means whatsoever, without an immediate assertion of his right, he is not entitled to a patent.

**THE case is stated in the opinion of the court.**

*Paine*, for the plaintiff.

*Emmet*, contra.

\* M'LEAN, J., delivered the opinion of the court.

[ \* 310 ]

This writ of error brings before this court, for its revision, a judgment of the circuit court of the United States for the southern district of New York.

An action was brought in the circuit court, by Shaw, against the defendant, Cooper, for the violation of a certain patent right, claimed by the plaintiff. The defendant pleaded the general issue, and gave notice that on the trial he would prove "that the pretended new and useful improvement in guns and fire-arms, mentioned and referred to in the several counts in the declaration; also, that the said pretended new and useful improvement, or the essential parts or portions thereof, or some or one of them, had been known and used in this country, namely, in the city of New York and in the city of Philadelphia, and in sundry other places in the United States, and in England, in France, and in other foreign countries, before the plaintiff's application for a patent as set forth in his declaration," &c.

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On the trial, the following bill of exceptions was taken: "to maintain the issue joined, the plaintiff gave in evidence certain letters-patent of the United States, as set forth in the declaration, issued on the 7th day of May, 1829; and, also, that the improvement for which the letters were granted, was invented or discovered by the plaintiff in 1813 or 1814; and that the defendant had sold instruments which were infringements of the said letters-patent.

"And the defendant then proved, by the testimony of one witness, that he had used the said improvement in England, and had purchased a gun of the kind there, and had seen others use the said improvement, and had seen guns of the kind in the duke of York's armory, in 1819. And also proved, by the testimony of five other witnesses, that, in 1820 and 1821, they worked in England at the business of making and repairing guns, and that the said improvement was generally used in England in those years; but [ \* 311 ] that they had never seen guns of the kind prior to those years; and also proved that, in the year 1821, it was used and known in France; and, also, that the said improvement was generally known and used in the United States after the 19th day of June, 1822.

"And the plaintiff, further to maintain the issue on his part, then gave in evidence that he, not being a worker in iron in 1813 or 1814, employed his brother in England, under strict injunctions of secrecy, to execute or fabricate the said improvement for the purpose of making experiments. And that the plaintiff afterwards, in 1817, left England and came to reside in the United States; and that, after his departure from England, in 1817 or 1818, his said brother divulged the secret for a certain reward to an eminent gun-maker in London. That, on the arrival of the plaintiff in this country, in 1817, he disclosed his said improvement to a gun-maker, whom he consulted as to obtaining a patent for the same, and whom he wished to engage to join and assist him. That the plaintiff made this disclosure under injunctions of secrecy, claiming the improvement as his own, declaring that he should patent it. That the plaintiff treated his invention as a secret after his arrival in this country, often declaring that he should patent it; and that this step was only delayed, that he might make it more perfect before it was introduced into public use; and that he did make alterations which some witnesses considered improvements in his invention, and others did not. That in this country the invention was never known nor used prior to the said 19th day of June, 1822; that on that day letters-patent were issued to the plaintiff, being then an alien, and that he immediately brought his invention into public use. That afterwards, and after suits had been

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brought for a violation of the said letters-patent, the plaintiff was advised to surrender them on account of the specification being defective; and that he did accordingly, on the 7th day of May, in the year 1829, surrender the same into the department of the secretary of state, and received the letters-patent first above named.

"And the plaintiff also gave in evidence that, prior to the 19th day of June, 1822, the principal importers of guns from England in New York and Philadelphia, at the latter of which cities the plaintiff resided, had never heard any thing of the \* said invention, or that the same was used or known in England; and that no guns of the kind were imported into this country, until in the years 1824 or 1825. And that letters-patent were granted in England on the 11th day of April, 1807, to one Alexander J. Forsyth, for a method of discharging or giving fire to artillery and all other fire-arms; which method he describes in his specification as consisting in the 'use or application as a priming, in any mode, of some or one of those chemical compounds which are so easily inflammable as to be capable of taking fire and exploding without any actual fire being applied thereto, and merely by a blow, or by any sudden or strong pressure or friction given or applied thereto, without extraordinary violence; that is to say, some one of the compounds of combustible matter, such as sulphur, or sulphur and charcoal, with an oxymuriatic salt; for example, the salt formed of dephlogisticated marine acid and potash, (or potasse,) which salt is otherwise called oxymuriate of potash; or such of the fulminating metallic compounds as may be used with safety; for example, fulminating mercury, or of common gunpowder mixed in due quantity with any of the above-mentioned substances, or with any oxymuriatic salt, as aforesaid, or of suitable mixtures of any of the before-mentioned compounds;' and that the said letters-patent continued in force for the period of 14 years from the time of granting the same."

And the defendant, further to maintain the issue on his part, gave in evidence a certain letter from the plaintiff to the defendant, dated in December, in the year 1824, from which the following is an extract: "Some time since I stated that I had employed counsel respecting regular prosecutions for any trespass against my rights to the patent; I have at length obtained the opinion of Mr. Sergeant of this city, together with others eminent in the law, and that is, that I ought (with a view to insure success) to visit England, and procure the affidavits of Manton and others, to whom I made my invention known, and also of the person whom I employed to make the lock at the time of invention; for it appears very essential that I should prove that I did actually reduce the principle to practice,

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otherwise a verdict might be doubtful. It is, therefore, my intention to visit England in May next for this purpose; in the mean [ \* 313 ] time \* proceedings which have commenced here are suspended for the necessary time."

And the court, on these facts, charged the jury that the patent of the 7th of May, 1829, having been issued, as appears by its recital, on the surrender and cancellation of the patent of the 19th day of June, in the year 1822; and being intended to correct a mistake or remedy a defect in the latter, it must be considered as a continuation of the said patent, and the rights of the plaintiff were to be determined by the state of things which existed in the year 1822, when the patent was first obtained.

That the plaintiff's case, therefore, came under the act passed the 17th day of April, 1800, extending the right of obtaining patents to aliens; by the 1st section of which the applicant is required to make oath that his invention has not, to the best of his knowledge or belief, been known or used in this or any foreign country. That the plaintiff most probably did not know, in the year 1822, that the invention for which he was taking out a patent had, before that time, been in use in a foreign country; but that his knowledge or ignorance on that subject was rendered immaterial by the concluding part of the section, which expressly declares, that every patent obtained pursuant to that act, for any invention which it should afterward appear had been known or used previous to such application for a patent should be utterly void. That there was nothing in the act confining such use to the United States; and that, if the invention was previously known in England or France, it was sufficient to avoid the patent under that act. That the evidence would lead to the conclusion that the plaintiff was the inventor in this case, but the court were of opinion that he had slept too long on his rights, and not followed them up as the law requires, to entitle him to any benefit from his patent. That the use of the invention, by a person who had pirated it, or by others who knew of the piracy, would not affect the inventor's rights, but that the law was made for the benefit of the public as well as of the inventor; and if, as appears from the evidence in this case, the public had fairly become possessed of the invention before the plaintiff applied for his patent, it was [ \* 314 ] sufficient, in the opinion of the court, to invalidate \* the patent; even though the invention may have originally got into public use through the fraud or misconduct of his brother, to whom he intrusted the knowledge of it.

Under this charge the jury found a verdict for the defendant, on which a judgment was entered.

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There is a general assignment of errors, which brings to the consideration of the court the principles of law which arise out of the facts of the case, as stated in the bill of exceptions.

It may be proper, in the first place, to inquire whether the letters-patent which were obtained in 1829, on a surrender of the first patent, have relation to the emanation of the patent in 1822, or shall be considered as having been issued on an original application.

On the part of the plaintiff it is contended that "the second patent is original and independent, and not a continuation of the first patent." That in adopting the policy of giving, for a term of years, exclusive rights to inventors in this country, we adopted at the same time the rules of the common law as applied to patents in England; and that, by the common law, a patent when defective may be surrendered to the granting power, which vacates the right under it, and the king may grant the right *de novo* either to the same or to any other person.

This being the effect of the surrender of a patent in England, it is insisted that the same consequence should follow a surrender in this country. On this subject, it is said that the decisions of the English courts are uniform, and that not even a *dictum* can be found that a second patent is a continuation of the first.

The counsel seems to consider this point of great importance, as the plaintiff was an alien when the first patent was obtained, but had become naturalized before the date of the second; and, consequently, that his rights under the second patent cannot be governed by the law applicable to aliens. As the inquiry on this head is, whether the second patent has relation to the first, it is not necessary to look into the laws to ascertain the respective rights of aliens and citizens on this subject. In regard to the right of the patentee to surrender a defective patent, and take out a new one, there can be no difference between a citizen and an alien.

\* That the holder of a defective patent may surrender it [ \*315 ] to the department of state and obtain a new one, which shall have relation to the emanation of the first, was decided by this court at the last term in the case of Grant and others *v.* Raymond, 6 Pet. 220. The chief justice in giving the opinion of the court says: "But the new patent, and the proceedings on which it issues, have relation to the original transaction. The time of the privilege still runs from the date of the original patent. The application may be considered as appended to the original application; and if the new patent is valid the law must be considered as satisfied, if the machine was not known or used before that application."

As this decision must be considered as settling the construction

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of the patent laws on this point, it is conclusive in the present case; and it is therefore unnecessary to examine the argument of the plaintiff's counsel, which was designed to lead to a different conclusion.

The second patent being a continuation of the first one, the rights of the plaintiff must be ascertained by the law under which the original application was made.

This law was passed on the 17th of April, 1800, and provides: "That all and singular the rights and privileges given to citizens of the United States respecting patents for new inventions, &c., shall be extended to aliens, who, at the time of petitioning shall have resided for two years within the United States, &c. Provided, that every person petitioning for a patent for any invention, art, or discovery, pursuant to this act, shall make oath or affirmation before some person duly authorized to administer oaths, before such patent shall be granted, that such invention, art, or discovery, hath not, to the best of his or her knowledge or belief, been known or used, either in this or any foreign country; and that every patent which shall be obtained pursuant to this act, for any invention, art, or discovery, which it shall afterwards appear had been known or used previous to such application for a patent, shall be utterly void."

By the act of the 21st of February, 1793,<sup>1</sup> which limits patent rights to citizens, it is provided: "That every person or [ \* 316 ] persons, \* in his or their application for a patent, shall state that the machine, &c., was not known or used before such application."

The 6th section of this act provides that a defendant, when prosecuted for a violation of a patent right, may give in evidence, under a notice, among other matters: "That the thing secured by patent was not originally discovered by the patentee, but had been in use, or had been described in some public work anterior to the supposed discovery of the patentee, or that he had surreptitiously obtained a patent for the discovery of another person; in either of which cases judgment shall be rendered for the defendant, with costs, and the patent shall be declared void."

It would seem, from the above provisions, that citizens and aliens, as to patent rights, are placed substantially upon the same ground. In either case, if the invention was known or used by the public before it was patented, the patent is void. In both cases, the right must be tested by the same rule.

From the facts in the case it appears that the plaintiff, while resid-

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<sup>1</sup> 1 Stats. at Large, 818.

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ing in England, in 1813, or 1814, invented the instrument secured by his patent. That, before he came to the United States, he made known his invention to his brother, to Mr. Manton, a gun-maker in London, and to others. That shortly after he came to the United States, in 1817, he disclosed his invention to a gun-maker in Philadelphia, and that in 1817 or 1818 the plaintiff's brother sold the invention to a gun-maker in London. That in 1819 the invention was sold and used in England; and that in the two following years it was in public use there, and in the latter year also in France. That on the 19th of June, 1822, his first patent was obtained.

It also appears that in April, 1807, a patent was granted in England to one Forsyth for fourteen years, for an invention on the same subject. The fact was shown by the plaintiff, it is presumed, as a reason why he did not take out a patent in England.

The question arises from these facts, and others which belong to the case, whether there was such a use in the public of this invention at the date of the plaintiff's first patent, as to render it void.

\* By the plaintiff's counsel it is insisted that, if an invention has been pirated, or fraudulently divulged, the inventor cannot thereby lose his right to his own invention and property; and it makes no difference that the public have acquired the use of the invention without any participation in the fraud, unless the inventor has acquiesced in such use.

The right of the plaintiff to his invention is compared to his right to other property, which cannot be devested by fraud or violence; and the case of *Millar v. Taylor*, 4 Burr. 2303, where seven judges against four held that, at common law, an author, by publishing a literary composition, does not abandon his right, is referred to as illustrative of the principle.

Several decisions by the circuit courts of the United States are cited to sustain the right of the plaintiff. In the case of *Whittemore v. Cutter*, 1 Gall. 482, the court say: "It will not protect the plaintiff's patent, that he was the inventor of the improvements, if he suffered them to be used freely and fully by the public at large for so many years, combined with all the usual machinery; for in such case he must be deemed to have made a gift of them to the public as much as a person who voluntarily opens his land as a highway, and suffers it to remain for a length of time devoted to public use."

In the case of *Goodyear v. Matthews*, 1 Paine, 301, the court, in substance, say "that, if the plaintiff be the inventor, it is immaterial that the invention has been known and used for years before the application." And in the case of *Morris v. Huntington*, 1 Paine, 354, the court say, that "no man is to be permitted to lie by for years, and

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then take out a patent. If he has been practising his invention with a view of improving it, and thereby rendering it a greater benefit to the public, before taking out a patent, that ought not to prejudice him. But it should always be a question submitted to the jury, what was the intent of the delay of the patent, and whether the allowing the invention to be used without a patent should not be considered an abandonment or present of it to the public."

This was a case where a second patent had been obtained, the first being defective, and this, it would seem, was deemed sufficient to protect the right of the plaintiff, though the public had been [ \* 318 ] \* in possession of the invention for six years before the emanation of the second patent.

Of the same import are the cases cited from 4 Mason, 108, and 4 Washington, 438 and 703.

The question what use in the public, before the application is made for a patent, shall make void the right of the patentee, was brought before this court by the case of Pennock and Sellers *v.* Dialogue, reported in 2 Pet. 1. In this case, the court say that "it has not been, and indeed cannot be denied, that an inventor may abandon his invention, and surrender or dedicate it to the public. This inchoate right, thus gone, cannot afterwards be resumed at his pleasure; for when gifts are once made to the public in this way, they become absolute. And again: "If an invention is used by the public, with the consent of the inventor, at the time of his application for a patent, how can the court say that his case is nevertheless such as the act was intended to protect? If such a public use is not a use within the meaning of the statute, how can the court extract the case from its operation, and support a patent, when the suggestions of the patentee were not true, and the conditions on which alone the grant was authorized, do not exist."

"The true construction of the patent law is," the court say, "that the first inventor cannot acquire a good title to a patent if he suffers the thing invented to go into public use, or to be publicly sold for use before he makes application for a patent."

In this case it appeared that the thing invented had been in use by the public, with the consent of the inventors, and through which they derived a profit, for seven years before the emanation of a patent. And this use was held by the court to be an abandonment of the right by the patentees.

The policy of granting exclusive privileges in certain cases was deemed of so much importance, in a national point of view, that power was given to congress, in the federal constitution, "to promote the progress of science and useful arts by securing, for limited times,

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to authors and inventors, the exclusive right to their respective writings and discoveries."

This power was exercised by congress in the passage of the acts which have been referred to. And from an examination of \* their various provisions, it clearly appears that it was the [ \* 319 ] intention of the legislature, by a compliance with the requisites of the law, to vest the exclusive right in the inventor only, and that on condition that his invention was neither known nor used by the public before his application for a patent. If such use or knowledge shall be proved to have existed prior to the application for the patent, the act of 1793 declares the patent void; and, as has been already stated, the right of an alien is vacated in the same manner by proving a foreign use or knowledge of his invention. That knowledge or use which would be fatal to the patent right of a citizen, would be equally so to the right of an alien.

The knowledge or use spoken of in the act of 1793 could have referred to the public only, for the provision would be nugatory if it were applied to the inventor himself. He must necessarily have a perfect knowledge of the thing invented, and its use, before he can describe it, as by law he is required to do preparatory to the emanation of a patent. But there may be cases in which a knowledge of the invention may be surreptitiously obtained and communicated to the public, that do not affect the right of the inventor. Under such circumstances, no presumption can arise in favor of an abandonment of the right to the public by the inventor; though an acquiescence on his part will lay the foundation for such a presumption.

In England, it has been decided that if an inventor shall suffer the thing invented to be sold, and go into public use for four months, and in a later case for any period of time, before the date of his patent, it is utterly void.

In that country, the right emanates from the royal prerogative; in this, it is founded exclusively on statutory provisions. But the policy in both governments is the same, in granting the right and in fixing its limits.

Vigilance is necessary to entitle an individual to the privileges secured under the patent law. It is not enough that he should show his right by invention, but he must secure it in the mode required by law. And if the invention, through fraudulent means, shall be made known to the public, he should assert his right immediately, and take the necessary steps to legalize it.

\* The patent law was designed for the public benefit, as [ \* 320 ] well as for the benefit of inventors. For a valuable invention, the public, on the inventor's complying with certain conditions,

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give him, for a limited period, the profits arising from the sale of the thing invented. This holds out an inducement for the exercise of genius and skill in making discoveries which may be useful to society and profitable to the discoverer. But it was not the intention of this law to take from the public that of which they were fairly in possession.

In the progress of society, the range of discoveries in the mechanic arts, in science, and in all things which promote the public convenience, as a matter of course, will be enlarged. This results from the aggregation of mind and the diversity of talents and pursuits which exist in every intelligent community. And it would be extremely impolitic to retard or embarrass this advance, by withdrawing from the public any useful invention or art, and making it a subject of private monopoly. Against this consequence, the legislature have carefully guarded, in the laws they have passed on the subject.

It is undoubtedly just that every discoverer should realize the benefits resulting from his discovery for the period contemplated by law. But these can only be secured by a substantial compliance with every legal requisite. His exclusive right does not rest alone upon his discovery, but also upon the legal sanctions which have been given to it, and the forms of law with which it has been clothed.

No matter by what means an invention may be communicated to the public before a patent is obtained; any acquiescence in the public use by the inventor will be an abandonment of his right. If the right were asserted by him who fraudulently obtained it, perhaps no lapse of time could give it validity. But the public stand in an entirely different relation to the inventor.

The invention passes into the possession of innocent persons, who have no knowledge of the fraud, and, at a considerable expense, perhaps, they appropriate it to their own use. The inventor or his agent has full knowledge of these facts, but fails to assert his right; shall he afterwards be permitted to assert it with effect? Is not [ \* 321 ] this such evidence of acquiescence \* in the public use on his part as justly forfeits his right?

If an individual witness a sale and transfer of real estate, under certain circumstances, in which he has an equitable lien or interest, and does not make known this interest, he shall not afterwards be permitted to assert it. On this principle it is, that a discoverer abandons his right, if, before the obtainment of his patent, his discovery goes into public use. His right would be secured by giving public notice that he was the inventor of the thing used, and that he should apply for a patent. Does this impose any thing more than reasonable diligence on the inventor? And would any thing short of this, be just to the public?

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The acquiescence of an inventor in the public use of his invention, can in no case be presumed, where he has no knowledge of such use. But this knowledge may be presumed from the circumstances of the case. This will, in general, be a fact for the jury. And if the inventor do not, immediately after this notice, assert his right, it is such evidence of acquiescence in the public use, as forever afterwards to prevent him from asserting it. After his right shall be perfected by a patent, no presumption arises against it from a subsequent use by the public.

When an inventor applies to the department of state for a patent, he should state the facts truly; and indeed he is required to do so, under the solemn obligations of an oath. If his invention has been carried into public use by fraud, but for a series of months or years, he has taken no steps to assert his right, would not this afford such evidence of acquiescence as to defeat his application, as effectually, as if he failed to state that he was the original inventor? And the same evidence which should defeat his application for a patent, would, at any subsequent period, be fatal to his right. The evidence he exhibits to the department of state is not only *ex parte*, but interested; and the questions of fact are left open, to be controverted by any one who shall think proper to contest the right under the patent.

A strict construction of the act, as it regards the public use of an invention, before it is patented, is not only required by its letter and spirit, but also by sound policy. A term of [ \* 322 ] fourteen years was deemed sufficient for the enjoyment of an exclusive right of an invention by the inventor; but if he may delay an application for his patent, at pleasure, although his invention be carried into public use, he may extend the period beyond what the law intended to give him. A pretence of fraud would afford no adequate security to the public in this respect, as artifice might be used to cover the transaction. The doctrine of presumed acquiescence, where the public use is known, or might be known to the inventor, is the only safe rule which can be adopted on this subject.

In the case under consideration, it appears the plaintiff came to this country from England, in the year 1817, and being an alien, he could not apply for a patent until he had remained in the country two years. There was no legal obstruction to his obtaining a patent in the year 1819; but it seems that he failed to apply for one, until three years after he might have done so. Had he used proper diligence in this respect his right might have been secured, as his invention was not sold in England until the year 1819. But, in the two following years, it is proved to have been in public use there, and in the latter year, also in France.

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Under such circumstances, can the plaintiff's right be sustained?

His counsel assigns as a reason for not making an earlier application, that he was endeavoring to make his invention more perfect; but it seems by this delay, he was not enabled, essentially, to vary or improve it. The plan is substantially the same as was carried into public use through the brother of the plaintiff, in England. Such an excuse, therefore, cannot avail the plaintiff. For three years, before emanation of his patent, his invention was in public use, and he appears to have taken no step to assert his right. Indeed, he sets up, as a part of his case, the patent to Forsyth, as a reason why he did not apply for a patent in England.

The Forsyth patent was dated six years before. Some of the decisions of the circuit courts, which are referred to, were overruled in the case of *Pennock and Sellers v. Dialogue*, 2 Pet. 1.

They made the question of abandonment to turn upon the intention [ \* 323 ] of the inventor. But such is not considered to be the true ground. Whatever may be the intention of the inventor, if he suffers his invention to go into public use, through any means whatsoever, without an immediate assertion of his right, he is not entitled to a patent; nor will a patent, obtained under such circumstances, protect his right.

The judgment of the circuit court must be affirmed, with costs.

1 H. 202; 17 H. 74; 21 H. 822; 2 Wal. 591; 7 O. 184.

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**SYLVAN PEYROUX and others, Claimants of Steamboat Planter,  
Appellants, v. WILLIAM L. HOWARD AND FRANCOIS VARION,  
Libellants.**

7 P. 324.

If the local law gives a lien to material-men for repairs of a domestic vessel within the ebb and flow of the tide, it may be enforced in the admiralty.

There are many facts, particularly geographical, the knowledge whereof is derivable from other sources than parol proof, which the court may judicially notice.

An express contract does not waive a lien unless it contains stipulations from which a waiver of the lien may fairly be inferred.

Giving a credit beyond the time when a vessel may be expected to sail, is a waiver of a lien under a local law, which provides that the lien shall cease if the vessel be allowed to depart without asserting it.

THE case is stated in the opinion of the court.

*Morton*, for the appellants.

*Livingston*, contra.

[ \* 339 ] \* THOMPSON, J., delivered the opinion of the court.

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This case comes up from the district court of the United States for the eastern district of Louisiana. The proceedings in the court below were *in rem* against the steamboat Planter, to recover compensation for repairs made upon the boat. [ \* 340 ]

The libel states that Howard and Varion, shipwrights, residing in the city of New Orleans, had found materials and performed certain work on the steamboat Planter, for which the said steamboat and her owners were justly indebted to them in the sum of \$2,193.35; and alleges that by the admiralty law, and the laws of the State of Louisiana, they have a lien and privilege upon the boat, her tackle, apparel, and furniture for the payment of the same; and prays admiralty process against the boat, and that the usual monition may issue.

The appellants afterwards appeared in court and filed their claim and plea, alleging that they are citizens of Louisiana, and residing in the city of New Orleans, and that they are the sole and lawful owners of the steamboat Planter; and alleging further, that the libellants are also citizens of the same State, and that the court had no jurisdiction of the case.

The plea to the jurisdiction of the court was overruled, and a supplemental and amended claim and answer filed, denying all and singular the facts set forth in the libel; and by consent of parties an order of court was entered, that the testimony of the witnesses for the respective parties be taken before the clerk of the court, and read in evidence upon the trial, subject to all legal exceptions; and upon the hearing of the cause the court decreed that the claimants should pay to the libellants \$2,193.35, and costs of suit. An appeal to this court was prayed and allowed.

Upon the argument here, the following points have been made:—

1. It does not appear upon the proceedings, that the court below had jurisdiction of the case.
2. That the libellants had waived any privilege or lien upon the steamboat under the law of Louisiana, and, therefore, proceedings *in rem* were improper.
3. If the court had jurisdiction, the decree is erroneous on the merits.

\* The want of jurisdiction in the district court is not put [ \* 341 ] on the ground set up in the plea in the court below, that all the parties were citizens of the same State. This has been very properly abandoned here, as entirely inapplicable to admiralty proceedings in the district court. But it is said that it does not appear upon the face of the proceedings that the cause of action properly belonged to admiralty jurisdiction. There can be no doubt that it

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must appear from the proceedings that the court had jurisdiction of the case.

The proceeding is *in rem* against a steamboat, for materials found and work performed in repairing the vessel in the port of New Orleans, as is alleged in the libel, under a contract entered into between the parties for that purpose. It is therefore a maritime contract; and if the service was to be performed in a place within the jurisdiction of the admiralty, and the lien given by the local law of the State of Louisiana, it will bring the case within the jurisdiction of the court.

By the Civil Code of Louisiana, article 2748, workmen employed in the construction or repair of ships and boats enjoy the privilege established by the code, without being bound to reduce their contracts to writing, whatever may be their amount; but this privilege ceases if they have allowed the ship or boat to depart without exercising their right. The state law, therefore, gives a lien in cases like the present.

In the case of *The General Smith*, 4 Wheat. 438, it is decided, that the jurisdiction of the admiralty in such cases, where the repairs are upon a domestic vessel, depends upon the local law of the State. Where the repairs have been made, or necessaries furnished to a foreign ship, or to a ship in the ports of a State to which she does not belong, the general maritime law gives a lien on the ship as security, and the party may maintain a suit in the admiralty to enforce his right. But as to repairs or necessaries in the port or State to which the ship belongs, the case is governed altogether by the local law of the State, and no lien is implied unless it is recognized by that law. But if the local law gives the lien, it may be enforced in the admiralty.

It is said, however, that the place where these services were performed was not within the jurisdiction of the admiralty.  
[ \*342 ] \*The services in this case were performed in the port of New Orleans, and whether this was within the jurisdiction of the court or not will depend upon the fact, whether the tide in the Mississippi ebbs and flows as high up the river as New Orleans.

This is a question of fact; and it is not undeserving of notice that, although there was a plea to the jurisdiction of the court interposed, the objection was not set up. Had it been put in issue, the evidence would probably have removed all doubt upon that question; not having been set up, it affords an inference that the objection could not have been sustained by proof.

But we think we are authorized judicially to notice the situation

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of New Orleans, for the purpose of determining whether the tide ebbs and flows as high up the river as that place. In the case of The Apollon, 9 Wheat. 374, it is said by this court, that it has been very justly observed at the bar, that the court is bound to take notice of public facts and geographical positions; and in the case of the steamboat Thomas Jefferson, the libel claimed wages earned on a voyage from Shippingport in the State of Kentucky, up the River Missouri, and back again to the port of departure. And the court say, that the voyage, not only in its commencement and termination, but in all its intermediate progress, was several hundred miles above the ebb and flow of the tide, and, therefore, in no just sense can the wages be considered as earned in a maritime employment. It is fairly to be inferred, that the court judicially noticed the fact, that the tide did not ebb and flow within the range of voyage upon which the services were rendered, as there is no intimation of any evidence before the court to establish the fact.

It cannot certainly be laid down as a universal, or even as a general proposition, that the court can judicially notice matters of fact. Yet it cannot be doubted that there are many facts, particularly with respect to geographical positions, of such public notoriety, and the knowledge of which is to be derived from other sources than parol proof, which the court may judicially notice. Thus in the case of the United States v. La Vengeance, 3 Dall. 297, 1 Pet. Cond. Rep. 132, the court judicially noticed the geographical position of Sandy Hook. And it may certainly take notice judicially of like notorious facts, as that the bay of New York, for instance, is within the ebb and flow of the tide.

The appellants' counsel has referred the court to Stoddard's Louisiana, 164, for the purpose of showing that the tide does not ebb and flow at New Orleans; but we think it affords a contrary conclusion. The author says, "the tides have little effect upon the water at New Orleans; they sometimes cause it to swell, but never to slacken its current." No distinction has ever been attempted in settling the line between the admiralty and common-law jurisdiction, growing out of the greater or less influence of the tide. So far as that admiralty jurisdiction depends upon locality, it is bounded by the ebb and flow of the tide; and if the influence of the tide is at all felt, it must determine the question. No other certain and fixed rule can be adopted; and, in determining this, we must look at the ordinary state of the water, uninfluenced by any extraordinary freshets.

The authority of Mr. Stoddard goes to show that the tides have some effect upon the water at New Orleans; they cause it to swell, but not so much as to slacken the current. In the case of Rex v.

Smith and others, 2 Doug. 441, it became a question whether the sea could properly be said to flow above London bridge. It was contended that the tide beyond that limit was occasioned by the pressure and accumulation backwards of the river water. Lord Mansfield said, a distinction between the case of the tide occasioned by the flux of sea water, or by the pressure backwards of the fresh water of a river, seemed entirely new.

We think that, although the current in the Mississippi, at New Orleans, may be so strong as not to be turned backwards by the tide, if the effect of the tide upon the current is so great as to occasion a regular rise and fall of the water, it may properly be said to be within the ebb and flow of the tide.

It has been argued, on the part of the appellant, that the evidence shows that this steamboat was to be employed in navigating waters beyond the ebb and flow of the tide, and therefore not employed in the maritime service. In the case of the steamboat Jeffer-  
[\* 344] son, the court said, there is no doubt the jurisdiction exists, although the commencement or termination of the voyage may happen to be at some place beyond the reach of the tide. The material consideration is, whether the service is essentially maritime service, and to be performed substantially on the sea or on tide water. All the service in the case now before the court was at New Orleans; and the first voyage, at all events, was to commence from that port. The objection, therefore, to the jurisdiction of the court, cannot be sustained.

2. The 2d exception is founded on a supposed waiver of any privilege or lien, and that the appellees trusted alone to the personal responsibility of the owners of the steamboat.

To determine this question, it becomes necessary to look at the contracts under which the repairs were made.

The first bears date on the 11th of September, 1830, by which certain specified repairs were to be made, for which the appellants stipulated to pay \$1,500. No time is fixed for the payment. The repairs contemplated by this contract were such only as could be made without hauling up the boat. In the progress of the work, however, it was discovered that more repairs were necessary than had been supposed, and which could not be made without hauling up the boat. And on the 19th of October, 1830, another contract was entered into, by which the owners agreed to pay \$475 for hauling up the boat, \$200 of which was to be paid in cash, and the balance in one month after the boat shall be launched and set afloat. The boat was then to be repaired under the instruction of Captain Jarreau, the work to be paid for when the account shall be approved by

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**Captain Jarreau.** The boat to be repaired and delivered afloat by the 20th of November, ready to receive a cargo; the appellees were to allow twenty-five dollars a day for each day they retarded the delivery.

An express contract having been entered into between the parties, under which these repairs are made, is no waiver of the lien, unless such contract contains stipulations inconsistent with the lien, and from which it may fairly be inferred that a waiver was intended, and the personal responsibility of the party only relied upon.

Express contracts are generally made \*for freight and sea- [ \* 345 ] men's wages, but this has never been supposed to operate as a waiver of a lien on the vessel for the same. There are certainly some of the older authorities which would seem to give countenance to the doctrine that an express contract operated as a waiver of the lien; but whatever may have been the old rule on the subject, it is settled, at the present day, that an express contract for a specific sum is not of itself a waiver of the lien, but that, to produce that effect, the contract must contain some stipulations inconsistent with the continuance of such lien, or from which a waiver may fairly be inferred. *Hutton v. Bragg*, 2 Marshall, 339; 4 Camp. 145, and the cases cited in note.

Applying these rules to the case before us, we can discover nothing (except as to \$275, the balance for hauling out the boat, which will be noticed hereafter,) inconsistent with the rights of a lien, or indicating any intention to waive it. In the first contract no time is fixed for the payment of the \$1,500; it became payable, therefore, as soon as the work was completed. And the repairs under the second contract were to be paid for as soon as the account was approved by Captain Jarreau. There is nothing, therefore, from which it can be inferred that any time or credit was to be allowed. The balance of \$275, for hauling out the steamboat, stands upon a footing a little different. That was to be paid in one month after the boat was launched and set afloat. A credit was here given; and a credit too beyond the time when, in all probability, the boat would have left the port of New Orleans; for it can hardly be supposed that it would have taken thirty days to load her. And by the civil code of Louisiana, art. 2748, the privilege ceases if the ship or boat is allowed to depart without exercising the right.

As to this sum, therefore, the decree is erroneous.

3. The principal ground of complaint under the 3d point made at the bar is, that the appellants have been made to pay twice for some part of the work. That is, that part of the work which was to be done under the first contract, and for which they were to

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[ \*346 ] pay \$1,500, has \*been charged under the second contract.

There is certainly some confusion growing out of the manner in which this work was carried on under the different contracts. The work which was to be performed under the first, was not completed when the second was entered into, and both being carried on at the same time, might very easily occasion some mistake. And in addition to this, there was, under the first contract, some extra work to be done and paid for over and above the stipulated sum of \$1,500, which rendered it still more difficult to keep the accounts for materials and labor under the different contracts, separate and distinct. The evidence was taken in writing out of court, and no opportunity afforded for explanation upon these points. The district judge, feeling the difficulties growing out of these circumstances, ordered Wilson, one of the witnesses whose deposition had been taken and read in evidence, to appear and answer in open court. He was the clerk of the appellees, who had kept an account of the timber used and work performed; and on his examination he swore that all the charges and items for work done, in the account of the libellants, were over and above the work done under the first contract for \$1,500. That the libellants had hands at work at the repairs under the contract and the extra work at the same time. That there is not a day's work nor a foot of plank charged in the account which was to be done under the first contract. This testimony leaves no reasonable doubt of the correctness of the account. By the second contract, payment was to be made when the account was approved by Captain Jarreau; no formal approval appears to have been made. But he was a part-owner, and superintended the repairs; and one of the witnesses says he was present when the account was presented to Captain Jarreau, who said he was not surprised at it, because there was a great deal more work than he had any idea of; and that he did not think at first that she required so much. This, although not a direct, was an implied approval of the account.

The delay in not delivering the boat to the appellants by the time specified in the contract, was occasioned by her unexpected state and condition, and the extent of repairs required. And [ \*347 ] \*besides, the delivery at the time mentioned in the contract, was dispensed with by Captain Jarreau.

Upon the whole, we are of opinion, that the decree of the district court, as to the \$275, must be reversed, and in all other respects affirmed.

10 P. 108; 11 P. 175; 8 H. 568; 5 H. 441; 6 H. 344; 17 H. 596; 19 H. 22; 20 H. 296;  
21 H. 248; 22 H. 129; 1 B. 522; 9 W. 186; 13 W. 243; 21 W. 579.

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*Magnise v. Thompson. 7 P.*

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**HOLLINESWORTH MAGNIAC and others, Plaintiffs in Error, v. JOHN R. THOMPSON.**

7 P. 348.

To render an antenuptial settlement void, as a fraud on creditors, both parties must concur in or have cognizance of the fraud; they must coöperate in the original design, at the time of its concoction, or carry it into effect with notice that it is fraudulent.

Marriage is a consideration of the greatest value, in contemplation of law, to support such a settlement.

By a valid antenuptial settlement, the wife becomes a creditor of the husband, and after marriage he may prefer that debt.

In New Jersey, the omission to record a deed of real estate, avoids it only as against creditors and purchasers of the grantor.

THE case is stated in the opinion of the court.

*C. J. Ingersoll*, for the plaintiff.

*Binney*, contra.

\* STORY, J., delivered the opinion of the court.

[ \* 389 ]

This is a writ of error to the circuit court for the district of Pennsylvania. The original action was a feigned issue between the plaintiffs, who are creditors, and the defendant, to try the question, whether he is able to pay the debt due to them; and this depends upon the validity of certain articles of settlement, made in contemplation of a marriage between the defendant and Miss Annis Stockton, daughter of the late Richard Stockton, Esq., stated in the case. The verdict in the court below was for the defendant; and judgment having been rendered thereon accordingly, the present writ of error is brought to revise that judgment, upon a bill of exceptions taken to the charge of the court at the trial.

The whole charge of the court is spread upon the record, (a practice which this court have uniformly discountenanced, and which, we trust, a rule made at the last term will effectually suppress;) and the question now is, whether that charge contains any erroneous statement of the law; for as to the comments of the court upon the evidence, it is almost unnecessary to say, after what was said by this court in *Carver v. Jackson*, 4 Pet. 80, 81, that we have nothing to do with them. In examining the charge for the purpose of ascertaining its correctness in point of law, the whole scope and bearing of it must be taken together. It is wholly inadmissible to take up single and detached passages, and to decide upon them without attending to the context, or without incorporating such qualifications and explanations as naturally flow from the language of other parts

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*Magniac v. Thompson. 7 P.*

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of the charge. In short, we are to construe the whole as it must have been understood, both by the court and jury, at the time when it was delivered.

The material facts are as follows: The plaintiffs and the defendant were resident merchants in China; and the defendant left it in March, 1825, to visit America. In the summer of that year he paid his addresses to Miss Stockton, then resident with her father in New Jersey, by whom his addresses were accepted; and in contemplation of marriage on the 19th of December, of the same year, the articles of marriage settlement referred to were executed. They purport to be articles of agreement and covenant between the defendant of the first part, Miss Annis Stockton of the second part, and Richard Stockton, father and trustee of Miss Stockton, of the third part. By these articles, after reciting the intended marriage, and that Richard Stockton, the father, had promised to give a certain lot of land (described in the articles) to his daughter, upon which the defendant, Thompson, had begun to build a house, it is stated that R. Stockton [ \* 391 ] covenants, in consideration of the \* said marriage, and his love and affection for his daughter, that from the time of the marriage he will stand seised of the lot and premises in trust to permit the defendant and Annis, his wife, to live in and occupy the same; and if they do not think proper so to do, then to let out the premises on lease, and receive the rents and profits and pay over the same to the said Annis during the joint lives of herself and her husband (the defendant); if the defendant should survive his said wife and have issue by her, then in trust to permit him during his life to inhabit and occupy the premises, if he should elect so to do, and to pay over the rents and profits to him for the support of himself and his family, without his (the defendant's) being accountable therefor; and after his death, in trust for the child or children of the marriage in equal shares as tenants in common; and if no children, then upon the death of either the husband or the wife, to convey the premises to the survivor in fee-simple. By the same instrument, the defendant covenants, that if the marriage should take effect, and in consideration thereof, he will, with all convenient speed, build and furnish the house in a suitable manner, as he shall judge fit and proper, and that the erections, improvements, and furniture shall be subject to and included in the trusts. And further, that he will, in the space of a year from the marriage, place out at good security, in stock or otherwise, the sum of \$40,000, and hand over and assign the evidences thereof to the trustee, who shall hold the same in trust to receive the interest, profits, and dividends thereof for the wife, during the joint lives of herself and her husband. And if she should die before

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her husband, and there should be issue of the marriage, then in trust to receive the interest, profits, and dividends, and pay the same to the husband during his life, for the support and maintenance of himself and children, without any account, and after his death, in trust for the children of the marriage. A similar provision is made in case of the survivorship of the wife; and if no children, then the trustee is to assign and deliver the securities and moneys remaining due to the survivor, to his or her own use.

Such are the most material clauses of the marriage articles. Before the execution of them, the defendant made out a written statement of his pecuniary circumstances, in which he [ \* 392 ] states that he owes no personal debts except to a small amount, in the common course of business; that he is surety for his father in a bottomry bond to Messrs. Schott and Lippincott, in the penal sum of \$200,000, upon which there was a pledge of goods, supposed to be sufficient to discharge the bond; and if any loss should accrue, it could not be more than \$20,000, and that he considered himself worth that amount, if not more, in addition to the sum proposed to be settled.

From the testimony in the case, which is stated in the charge, it appears that the marriage was consummated; that the defendant built the house on the lot mentioned in the articles at an expense of \$13,000, and furnished it at the expense of \$5,000, but invested no part of the \$40,000 during the life of the trustee. It also appears, that at the time of executing the articles, he was worth about 80 or \$90,000 in money and personal property; that his agent in China, in November and December, 1825, borrowed of the plaintiffs \$63,000 on the pledge and security of property of the invoice value of \$86,000 and upwards, on the credit of the defendant, but entirely for the use of the defendant's father, in order to complete the cargoes of his ships, then at Canton short of funds. The property arrived at a losing market, and the debt now due to the plaintiffs by the defendant, grew out of their transactions, his father having failed on the 19th of November, 1825; but the existence of the loan contracted with the plaintiffs, was not known to the defendant (though fully authorized to be made, if necessary,) until the spring of 1826.

The marriage articles were never recorded in New Jersey, where the land lies, until May, 1830, after the death of the trustee. In September, 1829, shortly before the plaintiffs obtained a judgment for either debt against the defendant, the defendant delivered over to Captain Robert Stockton, the son of the trustee, who succeeded him in the trust, securities to the amount of \$9,500 on account of the sum to be invested pursuant to the marriage articles.

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[ \*393 ] \* Such are the material facts which appeared at the trial, and the question was whether, under all the circumstances, the marriage articles were void as a fraud upon creditors. With reference to this point, the learned judge who delivered the charge to the jury, made among others, the following remarks: "To taint a transaction with fraud, both parties must concur in the illegal design. It is not enough to prove fraud in the debtor. He may lawfully sell his property, with the direct intention of defrauding his creditors, or prefer one creditor to another. But unless the purchaser or preferred creditor receives the property with the same fraudulent design, the contract is valid against other creditors or purchasers, who may be injured by the transaction." "Before you can pronounce this marriage agreement void and inoperative on the ground of actual fraud, you must be satisfied, not only that the defendant made it with design to defraud his creditors, but also that Mrs. Thompson, and her father and trustee, Mr. Richard Stockton, participated and concurred in the fraud intended. If they were innocent of the combination, it would be harsh and cruel in the extreme to visit on her the serious consequences of her intended husband's acts, and as inconsistent with law as justice." "The deeds, gifts, grants, or other contracts, which the law avoids, are those made with intent to defraud, hinder, delay, or injure creditors; and in order to avoid them, both the party giving and the party receiving must participate in the fraud." "The words of the law (the statute of 13 Elizabeth, c. 5,) require that both parties must concur in the fraud in order to bring the same within the provisions."

Nothing can be clearer, both upon principle and authority, than the doctrine, that to make an antenuptial settlement void, as a fraud upon creditors, it is necessary that both parties should concur in, or have cognizance of the intended fraud. If the settler alone intend a fraud, and the other party have no notice of it, but is innocent of it, she is not, and cannot be affected by it. Marriage, in contemplation of the law, is not only a valuable consideration to support such a settlement, but is a consideration of the highest value; and from motives of the soundest policy is upheld with a steady

[ \*394 ] resolution. The "husband and wife, parties to such a contract, are therefore deemed, in the highest sense, purchasers for a valuable consideration; and so that it is *bond fide*, and without notice of fraud, brought home to both sides, it becomes unimpeachable by creditors. Fraud may be imputable to the parties, either by direct coöperation in the original design at the time of its concoction, or by constructive coöperation from notice of it, and carrying the design, after such notice, into execution.

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The argument at the bar admits these principles to be incontrovertible. But it is supposed by the counsel for the plaintiffs in error, that the charge contains a different and broader doctrine; that it requires active coöperation, preconcert and participation in the original design of fraud; and that notice of it is not sufficient to avoid the settlement, although all the parties, after such notice, proceed to execute it.

It appears to us that this is an entirely erroneous view of the scope and reasoning of the charge, even in the passages above cited. But taking them in connection with other passages in the same charge, it is beyond doubt that no such distinction was in the mind of the court, or was in fact uttered to the jury. The language of the charge has reference to the actual posture of the case before the court, and not to any other possible state of facts. The case was not of a settlement already made and executed by the settler alone, with a fraudulent intent, to which settlement the wife or her trustee were not contemplated to be executing parties, and which was, after notice of the intent, accepted by them; in which the effect of notice might have been the very hinge of the cause. But the case was of marriage articles about to be executed by all the parties upon negotiations then had between them for that purpose; and of course, if there was a fraudulent design, known to all the parties at the time, the very execution of the articles made them all equally participators, and parties to the fraud. It necessarily involved combination, and participation, and preconcert. It was to this posture of facts that the reasoning of the charge was addressed; and it met and stated the law truly, as applicable to them. Notice under such circumstances, necessarily included participation in the fraud. It was not possible that the wife and her trustee, with notice of an intended fraud on \*the part of her husband, could execute the instrument without being, in the sense of the law, *participes delicti*.

But the charge does, in various other passages, distinctly point out to the jury the very doctrine which the plaintiffs in error assume as the basis of their argument, and for which they contend. Thus, in commenting upon the different classes of conveyances, to which the statute of 13 Eliz. is applicable, it is observed, that all conveyances are valid and excepted, which are "for a valuable consideration, in good faith, without notice by the person receiving the conveyance of any fraud, covin, or collusion by the grantor to defraud his creditors." Again, "the consideration being valuable, if the contract, whether executed or executory, is made in good faith, with one having no notice or knowledge of any fraud, covin, or collusion to"

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defraud creditors, performance may be enforced or voluntarily made, and the contract carried into execution at any time, either in the whole or in part, as is in the power of the party." Again : " It is the opinion of the court, that the evidence in this case brings the marriage contract within the 6th section of the law (the act of 13 Eliz.) excepting it from the operation of the 1st section; unless you shall find that it was made, not *bona fide*, or with notice or knowledge of a fraud in John R. Thompson in entering into it, brought home to his intended wife, and that Thompson actually entered into it with such fraudulent, covinous, and collusive intention." And, without dwelling on other passages equally expressive, it is added in the very close of the charge, "we conclude, then, with instructing you, that a settlement, made before marriage, makes the intended wife a purchaser for a valuable consideration; if agreed to be made, she is a creditor, and protected in the enjoyment of the thing settled, and entitled to the means of enforcing what is executory, if the transaction was *bona fide*, and without notice of fraud." That these directions are correct in point of law, cannot admit of doubt; and that they cover the whole ground asserted in the argument for the plaintiffs, seems equally undeniable. We may then dismiss any further commentary on this part of the case.

The next objection is, to the charge of the court in regard to the furniture. The court were requested to charge the jury [ \* 396 ] \*that the expenditure of \$5,000 in furnishing the house was, *per se*, fraudulent. The court refused so to do, stating, "that furniture is part of the marriage contract, to be provided by Thompson, in a suitable manner, as he should think fit. He had a discretion which he might exercise in a reasonable manner, according to their station and associations in life, proportioned to the kind of house and extent of income; the trustee or wife could not, in law or equity, compel Thompson to furnish it extravagantly, or at useless and wanton expense; and if he should do it voluntarily, it would not be within the true spirit and meaning of the marriage articles, and might be deemed a legal fraud on creditors as to the excess. But before we can say that it is a fraud in law to expend \$5,000 in furnishing a house costing \$13,000, and the establishment to be supported by the income of an investment of \$40,000 in productive funds, we must be satisfied that it is, at the first blush, an extravagant and unwarranted expenditure under all the circumstances in evidence, and to an extent indicating some fraudulent or other motive unconnected with the fair execution of the contract, of which we are not satisfied.

It is difficult to perceive any error in this direction; and it was

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going quite as far in favor of the plaintiffs in error as the law would warrant; for the change of circumstances of the defendant made no difference in his obligations to perform the stipulations of the marriage articles. The court might well have refused to give the instruction without any explanation, for it was asking them to decide, as matter of law, what was clearly matter of fact. The argument at the bar has indeed insisted that the court misunderstood the object and request of the counsel; but there is no evidence of that on the record, and certainly it is not to be presumed.

The next objection is to the charge of the court respecting the delivery of the notes to Captain Robert Stockton, in September, 1829. The court were requested to charge the jury, that the delivery of these notes to Captain Stockton was a fraud. The court directed the jury that "if it was done in order to comply, in part, with the agreement, it was not so. If it was colorable, made with the intention of covering and concealing \* so much, under pretence of the [ \*397 ] marriage articles, for Thompson's use, and so received by the trustee, it was legally fraudulent as to creditors; but if delivered with such intention, and not so accepted, then Captain Stockton might not only fairly apply it to the trust-fund, but was bound so to do. Though it may have been done on the eve of the judgment confessed in New Jersey, that would make no difference; it being to carry into effect the agreement of December, 1825."

We cannot perceive any error in this part of the charge. The wife became a purchaser and creditor of her husband, in virtue of the marriage articles; and if the delivery of the notes was made in part performance of these articles, *bonâ fide*, and without fraud, it was a discharge of a moral as well as of a legal duty. Among creditors equally meritorious, a debtor may conscientiously prefer one to another; and it can make no difference that the preferred creditor is his wife.

The remaining objection is, that the marriage articles are inoperative and void, not having been recorded within the time prescribed by the laws of New Jersey for the registration of conveyances. To this objection several answers may be given, each of which is equally conclusive against the plaintiffs in error. In the first place, marriage articles or settlements, as such, are not required by the laws of New Jersey to be recorded at all, but only conveyances of real estate; and, as to conveyances of real estate, the omission to record them avoids them only as to purchasers and creditors, leaving them in full force between the parties. This is the express provision of the statute of New Jersey of 1820,<sup>1</sup> so that, notwithstanding the non-

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1 See the act of 1820. *Laws of New Jersey*, edition of 1821, p. 747.

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Owings v. Kincannon. 7 P.

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registration, the articles were good between the parties. In the next place, as to the personal estate, covenanted on the part of the defendant to be settled on his wife, whether furniture or money, it is clear that the non-registration of the articles could produce no effect whatever. If the conveyance was free of fraud, it was as to the personal estate completely valid, even against creditors. In the next place, as to the real estate covered by the articles, whether these articles are

treated as an actual conveyance, or as an executory contract, [ \* 398 ] it is clear that, \*except as to the creditors of the grantor,

Mr. Stockton, they were completely valid and operative. Viewed as a conveyance, or as a contract for a conveyance, the husband could not, consistently with the avowed trusts, take any legal estate or executed use in the real estate. The grantor necessarily remained the legal owner, in order to effectuate the trusts of the settlement; and the husband could entitle himself to the benefit of the trusts provided in his favor, only in the events and upon the contingencies which are therein stated. He had no equitable interest therein capable of a present appropriation by his creditors. In every view of the circumstances, it is therefore clear that the non-registration of the articles does not touch the plaintiff's rights; and the court were correct in their instruction to the jury, "that the marriage contract is not void for want of being recorded in time."

Upon the whole, it is the unanimous opinion of the court that the judgment of the circuit court ought to be affirmed, with costs.

*Judgment accordingly.*

9 O. 659.

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THOMAS DEYE OWINGS and others, Appellants, v. ANDREW KINCANNON, Appellee.

7 P. 399.

Where some of the defendants, who were united in interest under a decree, did not join in an appeal, nor appear to have had notice and to have refused to join, the appeal was dismissed.

The record stating generally that an appeal was claimed and allowed, and the appeal bond reciting that only two out of six defendants claimed and were to prosecute the appeal, the court considered this as explaining the general entry, and the appeal was dismissed.

THE case is stated in the opinion of the court.

*Bibb*, for the motion.

*Loughborough*, contra.

[ \* 401 ] \* MARSHALL, C. J., delivered the opinion of the court.

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\* This is an appeal from a decree pronounced in the court [ \* 402 ] of the United States for the district of Kentucky, by which Thomas Deye Owings, James W. Blakey, Ralph Phillips, Milton Stapp, John L. Head, and Charles Buck, were directed to convey and release to the complainant all their right, title, and interest in a tract of land mentioned in the decree. An appeal was allowed, and a bond executed by Lewis W. R. Phillips, Sally Head, and Nancy Head, the condition of which recites "that, whereas Lewis W. R. Phillips, Sally Head, and Nancy Head, have prayed for and have obtained an appeal from the 7th circuit court of the United States in and for the Kentucky district to the supreme court of the United States, in a certain suit in chancery wherein said Andrew Kincañnon was complainant, and Thomas D. Owings, Ralph Phillips, the ancestor of the said L. W. R. Phillips, and John L. Head, the husband of said Sally Head and ancestor of Nancy Head, were defendants.

" Now, if the said Lewis W. R. Phillips shall well and truly prosecute," &c.

The particular statement in the bond is considered by the court as explaining the general entry granting the appeal, so as to show that from a joint decree against six defendants, only two, represented by their heirs, have appealed.

A motion is now made to dismiss this appeal, because the decree being joint, all the parties ought to join in the appeal.

Upon principle, it would seem reasonable that the whole cause ought to be brought before the court, and that all the parties who are united in interest ought to unite in the appeal. We have, however, found no precedent, in chancery proceedings, for our government in this case. But in the case of *Williams v. The Bank of the United States*, 11 Wheat. 14, which was a writ of error, sued out by one defendant to a judgment against three, the writ was dismissed; the court being of opinion that it had issued irregularly, and that all the defendants ought to have joined in it.

By the Judicial Act of 1789,<sup>1</sup> decrees in chancery pronounced in a circuit court could be brought before this court only by writ of error. The appeal was given by the act of 1803.<sup>2</sup> That act declares "that such appeals shall be subject to the same rules, [ \* 403 ] regulations, and restrictions as are prescribed by law in cases of writs of error."

Previous to the passage of this act, the decree under consideration could have been brought into this court only by writ of error, in

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<sup>1</sup> 1 Stat. at Large, 73.

<sup>2</sup> 2 Ib. 244.

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which writ all the defendants must have joined. The language of the act which gives the appeal, appears to us to require that it should be prosecuted by the same parties who would have been necessary in a writ of error. We think, also, that the same principle would be applicable, from the general usage of chancery, to make one final decree binding on all the parties united in interest.

The appeal must be dismissed, having been brought up irregularly.

12 P. 140; 16 P. 521; 20 H. 280; 6 Wal. 855; 10 Wal. 417; 11 W. 87; 18 W. 188;  
20 W. 157.

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**JOSEPH BARLOW, CLAIMANT OF EIGHTY-FIVE HOGSHEADS OF SUGAR,  
Appellant, v. THE UNITED STATES.**

7 P. 404.

Under the 84th section of the Collection Act of March 2, 1799, (1 Stats. at Large, 694,) a forfeiture may be incurred by entering for drawback, under a false denomination, sugars not previously imported and subjected to duty.

If entered by a false denomination, the burden of proof is upon the claimant to show that it was by mistake or accident, and a mistake of law is not sufficient.

Though among-sugar refiners, sugars, which have not undergone the process of claying, may be spoken of as refined sugar, yet, if this term, among buyers and sellers in this country generally, is applied only to lump and loaf sugar, the term in the acts of congress must be construed to include only those articles.

THE case is stated in the opinion of the court.

*Morton and Ogden*, for the appellant.

*Taney*, (attorney-general,) *contra*.

[ \* 406 ] \* STORY, J., delivered the opinion of the court.

This is a libel of seizure instituted in the district court for the southern district of New York, which comes before this court upon an appeal from a decree of the circuit court of that district, condemning the property, namely, eighty-five hogsheads of sugar, as forfeited to the United States.

The charge in the libel is, that the sugars were entered in the office of the collector of the customs for the district of New York, for the benefit of drawback or bounty upon the exportation thereof, by a false denomination, with an intent to defraud the revenue. The claimant in his claim admits that he made the entry for the benefit of the drawback on the exportation; but he denies that the entry was made by a false denomination; and he asserts that the sugars are truly refined sugars, as they are denominated in the entry.

The 84th section of the Duty Collection Act of 1799, c. 128, upon which the libel is founded, provides, that if any goods, wares, or mer-

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chandise, of which entry shall have been made in the office of a collector for the benefit of drawback or bounty upon exportation, shall be entered by a false denomination, or erroneously as to the time when, and the vessel in which they were imported, or shall be found to disagree with the packages, quantities, or qualities, as they were at the time of the original importation, &c., &c., all such goods, wares, and merchandises, &c., shall be forfeited; provided, that the said forfeiture shall not be incurred, if it shall be made to appear to the satisfaction of the collector, &c., or of the court, in which a prosecution for the forfeiture shall be had, that such false denomination, error, or disagreement, happened by mistake or accident, and not from any intention to defraud the revenue.

\* The language of this section is certainly sufficient to include the case at bar, if all the material facts are established. [ \* 407 ]

The sugars were entered for the benefit of drawback, or bounty, in the office of the collector; and if the entry was by a false denomination, the forfeiture is incurred, unless the claimant can avail himself of the proviso, or some other matter in defence.

It has, however, been contended at the bar, that in the case of refined sugars, exported for the benefit of drawback and bounty, no entry is required by law to be made at the office of the collector; but that a system of regulations has been specially provided for such exportations, which supersedes or controls those of the 84th section. And in support of this argument it has been urged, that the 84th section applies only to articles which have been previously imported and subjected to duties.

It appears to us upon full consideration, that this argument is not well founded. Sugars have been made subject to duties upon their importation from the first establishment of the government down to the present time, in every tariff law; and it is notorious, that until after the acquisition of Louisiana in 1803, no sugars were grown in the United States; and, consequently, all which were used or refined within the United States must have been of foreign growth and importation. So, that if an entry under the 84th section were required only upon the exportation of dutiable articles which had been imported, all sugars, whether refined or not, might have been within the provisions of that section. This is rendered still more obvious by the terms of the act of the 5th of June, 1794, c. 51,<sup>1</sup> which first gave a drawback upon refined sugars. That act laid a duty of two cents per pound upon all sugar which should be refined in the United States; and declared, that the duties thereby laid upon such sugar, should

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<sup>1</sup> 1 Stats. at Large, 384.

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and might be drawn back upon such sugar refined within the United States after the 30th of September then next, which after that day should be exported from the United States to any foreign port or power; "and adding to the drawback upon sugar so exported three cents per pound on account of duties paid upon the importation of raw sugar." This act was continued in force until March, [ \* 408 ] 1801; and then was permitted to expire. It contains, however, substantially the same provisions in regard to the proceedings to be had by the exporter upon the exportation of refined sugar, as are contained in the subsequent acts, by which the system of drawbacks upon refined sugar was revived; and especially the act of 24th of July, 1813, c. 21,<sup>1</sup> which still remains in full force. See act of 24th of July, 1813, c. 21; act of 30th April, 1816, c. 172;<sup>2</sup> act of 20th April, 1818, c. 365, § 11;<sup>3</sup> act of 20th January, 1829, c. 11.<sup>4</sup> So that it is clear, that the regulations prescribed on the subject of the drawback upon refined sugars by the act of 1794 were not supposed by the legislature to interfere in any manner with the provisions of the 84th section of the act of 1799; but were deemed auxiliary to the same general object, the prevention of frauds upon the revenue. They are quite compatible with each other, and aim at the same result. The terms, however, of the 84th section are not confined to cases of drawback upon imported goods; (though from what has been already stated, all sugars at that period must have fallen under that predicament;) but they apply to any goods, wares, and merchandise, of which entry shall be made for the benefit of drawback or bounty. Other provisions of the act of 1799, c. 128, demonstrate this intent in the fullest manner. The bounty given by the 83d section of the same act, on pickled fish and salted provisions, would be strongly in point. But the 76th section of the same act speaks directly to the purpose; and after prescribing the notice to be given by the exporter to entitle himself to the benefit of the drawback, it provides that he shall make entry of the particulars thereof at the custom-house, &c.; and if imported articles, the name of the vessel, &c., and the place from which they were imported. So that the form of the entry contemplated cases of non-imported, as well as of imported articles. The act of 20th of February, 1819, c. 447,<sup>5</sup> manifestly contemplates the same system of entries in such cases as then fully in existence; for it provides that, "in addition to the forfeitures and penalties heretofore provided by law for making a false entry with the collector of any district of any goods, &c., [ \* 409 ] for the benefit of drawback or bounty on \*exportation, the

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<sup>1</sup> 8 Stats. at Large, 35.<sup>2</sup> Ib. 388.<sup>3</sup> Ib. 444.<sup>4</sup> 4 Ib. 331.<sup>5</sup> 3 Ib. 486.

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person making such false entry shall, except in the cases heretofore excepted by law, forfeit and pay to the United States a sum equal to the value of the articles mentioned or described in such entry." It is impossible to give any rational interpretation to this enactment, unless by referring it back to the 84th section of the act of 1799, as one then operative in its fullest extent on all subjects of drawback. And the circumstances of this case abundantly establish, that such has been the practical construction of these acts by the government, as well as of the custom-house department. We think, then, that this objection cannot be sustained.

The next question is, whether the sugars were in this case entered by a false denomination. They were entered by the name of "refined sugars." They were, in fact, sugars known by the appellation of bastar, or bastard sugars, which are a species of sugars of a very inferior quality, of less value than the raw material; they are the residuum or refuse of clayed sugars, left in the process of refining, after taking away the loaf and lump sugar, which results from that process. The question is, whether this species of sugar is, in the sense of the acts of congress, "refined sugar." These acts allow a drawback "on sugar refined within the United States."

It has been contended in argument, that all sugars which have undergone the full process of refining, after they have arrived at the point of granulation, are properly to be deemed refined sugars, whether they have been clayed or not. In a certain sense, they may certainly be then deemed to be refined; that is, in the sense of being then clarified and freed from their feculence. But the question is, whether this is the sense in which the words are used in the acts of congress.

The acts of congress on this subject, are regulations of commerce and revenue; and there is no attempt in any of them to define the distinguishing qualities of any of the commodities which are mentioned therein. Congress must be presumed to use the words in their known and habitual commercial sense; \*not [ \* 410 ] indeed in that of foreign countries, if it should differ from our own, but in that known in our own trade, foreign and domestic. If in a loose signification among refiners, sugars should sometimes be spoken of as being refined, without having undergone the further process of claying; or if the whole mass resulting from that process should sometimes indiscriminately acquire among them that appellation in a like loose signification; still, if among buyers and sellers generally in the course of trade and business, the appellation "refined sugars," is exclusively limited to the products called lump and loaf sugar, and never includes bastard sugar, the acts of congress ought to be construed in this restrictive sense, as that peculiarly belonging

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to commerce. This was the doctrine of this court asserted in the case of Two Hundred Chests of Tea, Smith, claimant, 9 Wheat. 438, 439; and there is not the slightest inclination on the part of this court to retract it. Now, without minutely sifting the evidence in this case, we think that there is a decisive and unequivocal preponderance of evidence to establish, that bastard sugar is not deemed, in a commercial sense, "refined sugar." The appellation is exclusively limited to such as have assumed at some time the form of white refined loaf or lump sugars. This is established, not merely by the testimony of merchants and grocers, and persons in the custom-house, but by the testimony of sugar refiners. A sale of refined sugars would be deemed by them not complied with by a delivery of bastard sugars. If this be so, it puts an end to the question, whether the sugars in controversy were entered by a false denomination.

If they were entered by a false denomination, then they are subject to forfeiture, unless the party can bring himself within the exceptions of the proviso of the 84th section. And here the *onus probandi* rests on him to extract the case from the penal consequences of an infraction of the law. Were these sugars entered by a false denomination, happening by mistake or accident, and not from any intention to defraud the revenue? There was no accident in the case; there was no mistake in point of fact; for the party knew what

[ \* 411 ] the article was when he entered it. The only mistake, if there has been \*any, is a mistake of law. The party in the present case has acted, indeed, with his eyes open; against the known construction given to the acts by the government and the officers of the customs. He has not been misled; and his conduct in the course of making the shipment, if it be entirely compatible with good faith, is not wholly free from the suspicion of an intention to overreach, and evade the vigilance of the custom-house department. He has made every effort in his power to obtain the drawback, by passing off, as refined sugars, what he well knew were not admitted to be such by the higher government officers.

But we do not wish to put this case upon any ground of this sort. It presents the broader question, whether a mistake of law will excuse a forfeiture in cases of this description. We think it will not. The whole course of the jurisprudence, criminal as well as civil, of the common law, points to a different conclusion. It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally; and it results from the extreme difficulty of ascertaining what is, *bon*i* fide*, the interpretation of the party; and the extreme danger of allowing such excuses to be

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set up for illegal acts to the detriment of the public. There is scarcely any law which does not admit of some ingenious doubt; and there would be perpetual temptations to violations of the laws, if men were not put upon extreme vigilance to avoid them. There is not the least reason to suppose that the legislature, in this enactment, had any intention to supersede the common principle. The safety of the revenue, so vital to the government, is essentially dependent upon upholding it. For mistakes of fact, the legislature might properly indulge a benignant policy, as they certainly ought, to accidents. The very association of mistake and accident, in this connection, furnishes a strong ground to presume that the legislature had the same classes of cases in view; accident, which no prudence could foresee or guard against, and mistakes of fact, consistent with entire innocence of intention. They may both be said, in a correct sense, to happen. Mistakes in the construction of the law, seem as little intended to be excepted \* by the proviso, as accidents [ \* 412 ] in the construction of the law. Without going more at large into the circumstances of the case, it is the opinion of the court that the judgment of the circuit court ought to be affirmed, with costs.

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JAMES W. BREEDLOVE AND WILLIAM L. ROBESON, Plaintiffs in Error  
v. THEODORE NICOLET AND J. J. SIGG.

7 P. 413.

By the law of Louisiana, the contract of a mercantile firm creates an obligation *in solido*, and two of the partners may be sued thereon, if the third is out of the jurisdiction.

Misnomer of one of the plaintiffs cannot be alleged after judgment.

An averment that the plaintiffs are aliens, not traversed, is confessed.

Aliens, resident in the United States, can sue in the courts of the United States.

A plea that all the promisees are not joined, filed after the trial was begun, by leave of court, may be stricken out by its subsequent order.

Under the insolvent law of Louisiana, a creditor is entitled to personal notice, and if not given, the proceedings, as to him, are not binding.

THE case is stated in the opinion of the court.

Coxe, for the plaintiffs.

Livingston, contra.

\* MARSHALL, C. J., delivered the opinion of the court. [ \* 426 ]

This suit was instituted in the court of the United States for the eastern district of Louisiana, by Theodore Nicolet and J. J. Sigg, subjects of the Republic of Switzerland, merchants and partners, trading under the firm of Theodore Nicolet and Co., against

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James W. Breedlove and William L. Robeson, members of a commercial company consisting of J. R. Bedford, James W. Breedlove, and William L. Robeson, merchants and partners, formerly doing business under the firm of Bedford, Breedlove, and Robeson.

The petition, which in the courts of Louisiana supplies the place of a declaration at common law, is founded on a promissory note in the following words: —

New Orleans, November 22, 1826.

[ \* 427 ]   \* \$2,964.10.

Sixty days after date we promise to pay to order of Messrs. Theodore Nicolet and Co., twenty-nine hundred sixty-four and ten hundredths dollars, value received.

**BEDFORD, BREEDLOVE, AND ROBESON.**

In June, 1829, the defendants filed their plea and answer, setting forth that after the execution of the said note, their affairs having become embarrassed, they made out a full and complete schedule, exhibiting all their property and the debts due to and from them, which said property was duly accepted by the judge of the parish court for the benefit of the creditors placed on the said schedule, among whom were the plaintiffs, Theodore Nicolet and Co., who were then and at the time of the execution of the said note, residents of New Orleans. The answer then sets forth at large the proceedings after the acceptance of the property, and the final discharge of the defendants by the judgment of the parish court, given in pursuance of the laws of the State, which judgment they plead in bar of the action.

Afterwards, in January, 1830, the cause came on for trial, when the following entry was made: "This cause came on for hearing before the court, when, after hearing the arguments of counsel in part, it is ordered that this cause be set for trial on the jury docket on the plea filed this day." And afterwards, on the same day, "came the defendants by their counsel and filed the following plea."

This plea objects to the jurisdiction of the court, because the note in the petition mentioned was drawn by Bedford, Breedlove, and Robeson, payable to the order of Theodore Nicolet and Co., which said firm of Theodore Nicolet and Co. is composed of other persons than the said Theodore Nicolet and the said J. J. Sigg: to wit, Germain Musson and others, all and each of whom are citizens of the United States and State of Louisiana.

The plea further alleges, that Frederick Beckman, a remote indorser on the said note, had, since the indorsement, become a citizen. The plaintiffs objected to the reception of this plea to the jurisdiction, because it came too late.

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Afterwards, in May 1830, the court, on a rehearing, overruled \* the plea to the jurisdiction which had been received [ \* 428 ] at the January term. The defendants excepted to this decision.

The cause came on for trial before the court, a jury not having been required, when the following admissions were made:—

"It is admitted that the persons composing the firm of T. Nicolet and Co. were residents of the State at the time of the execution of the note sued, and have continued so up to the present date; that they are, however, absent about six months in the year, but, when so absent, have their agents to attend to their business; and that their commercial house has existed in New Orleans ever since the execution of the said note. It is also admitted that, at the time of the execution of the said note, the defendants, J. W. Breedlove and William L. Robeson, were residents of the city of New Orleans, and citizens of the State of Louisiana."

These admissions are of no importance in the cause. The residence of aliens within the State, constitutes no objection to the jurisdiction of the federal court.

The defendants offered in evidence the record of the bankrupt proceedings from the parish court. It was admitted that the meeting of the creditors was duly advertised in the public prints. The plaintiffs objected to the admission of this record, but the court determined that it should be read.

The defendants also gave in evidence the record of the proceedings of the court in a suit brought by the plaintiff, J. J. Sigg, on the same note, against Bedford, Breedlove, and Robeson, to which the defendants, James W. Breedlove and William L. Robeson, appeared, and pleaded to the jurisdiction of the court, on which the suit was discontinued on motion of the plaintiffs' counsel.

In June, 1830, the court rendered its judgment in favor of the plaintiffs for the amount of the note, with interest; which judgment is brought before this court by writ of error.

The plaintiffs assign the following errors in the proceedings of the district court.

1. The action was irregularly instituted, no process having been sued out against Bedford, one of the partners, and the contract being joint as well as several.

\* 2. Neither in the petition, writ, or in any part of the [ \* 429 ] proceedings, is the Christian name of Sigg set forth.

3. There is no evidence that the petitioners are aliens. They are shown to have been at the date of the note, and to the time of the trial, residents of New Orleans.

4. If originally aliens, their residence in New Orleans renders them incapable of suing in the courts of the United States.

5. There is no averment or proof that Bedford, one of the parties to the note, was subject to the jurisdiction of the court.

6. The plea to the jurisdiction was properly filed, and ought not to have been taken from the files of the court.

7. The plaintiffs being parties to the insolvent proceedings, were stopped from questioning the sufficiency of the discharge.

1. The first error assigned, that the suit is brought against two of three obligors, might be fatal at common law. But the courts of Louisiana do not proceed according to the rules of the common law. Their code is founded on the civil law, and our inquiries must be confined to its rules.

The note being a commercial partnership contract, is what the law of Louisiana denotes a contract *in solido*, by which each party is bound severally as well as jointly, and may be sued severally or jointly. The Civil Code of Louisiana, article 2080, directs, "that in every suit on a joint contract, all the obligors must be made defendants; and the succeeding article directs that "judgment must be rendered against each defendant separately, for his proportion of the debt or damages."

Article 2086 says: "There is an obligation *in solido* on the part of the debtors, where they are all obliged to the same thing, so that each may be compelled for the whole." Article 2088 says: "An obligation *in solido* is not presumed; it must be expressly stipulated."

This rule ceases to prevail only in cases where an obligation *in solido* takes place of right by virtue of some provisions of the law." Pothier, from whom this article appears to be taken, part 2, c. 3, art. 8, gives, in number 266, as one of the instances in which the law presumes it, "where partners in commerce contract some obligation in respect of their joint concern."

This then is a contract *in solido*, on which the parties may [ \*430 ] \*be sued severally or jointly, and by which each is liable for the whole.

The Civil Code, so far as we are informed, does not affirm or deny that a suit may be sustained on such a contract against two of three obligors. The rules of practice in Louisiana, so far as we understand them, require that the petition should state the truth of the case, and should show a right in the petitioner to recover. It is not denied that this petition states the case truly, nor is it denied that the petitioner has a right to recover from the defendants the sum demanded. It is alleged that he has not a right to recover it in the form of action which he has adopted. He might have obtained a judgment against

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each for the whole sum, but not, it is said, against two of them, in one action. If this be the rule of the common law, it is a mere technical rule, not supported by reason or convenience. No reason other than what is merely technical can be assigned for requiring the additional labor and expense of two actions for the attainment of that which may be as well attained by one. We have no reason for supposing that this technical principle has been engrafted on the civil law. The contrary is to be inferred from the practice of that branch of it with which we are familiar. It is a rule in chancery that all those against whom a decree can be made, shall be brought before the court, if they are within its jurisdiction. A court of equity, proceeding on the principles of the civil law, would not tolerate separate actions in this case. That court, in a case of which it would take cognizance, might require that all those bound in the note should be brought before it in the same suit, not that separate actions should be brought against those who might be sued in one. On the principles of the civil law it would seem that the defendants may be required to account for not joining the third promisor in the suit, not for joining two of them. The record contains ample evidence to this point.

In the bankrupt proceedings given in evidence by the defendants in the district court, the petitioners state John R. Bedford to be a resident of the State of Alabama, and the schedule required by law also states him to be of Alabama.

In the record of the proceedings brought by J. J. Sigg on the same note, against Bedford, Breedlove, and Robeson, the defendants \* plead to the jurisdiction of the court, and alleged in [ \* 431 ] their plea that John R. Bedford, one of the members of the firm of Bedford, Breedlove, and Robeson, was not a citizen of the State of Louisiana, but is an inhabitant and citizen of the State of Alabama. The suit was discontinued on the motion of the plaintiffs' counsel.

It was then fully shown to the court that Bedford could not have been joined in the action; and it has been repeatedly decided that in chancery, if the court can make a decree according to justice and equity between the parties before them, that decree shall not be withheld because a party out of its jurisdiction is not made a defendant, although he must have been united in the suit had he been within reach of the process of the court. In this case the judgment conforms to right and justice, since the plaintiffs were entitled to claim the full sum from each of the defendants.

In a question of doubtful practice, it ought not to be entirely disregarded that the defendants in the district court have not taken thi-

objection, though they pleaded to the jurisdiction of the court. 2 Pothier, p. 2, c. 3, art. 8, Nos. 270, 271, would seem to indicate that more than one, and less than all the obligors, when bound *in solido*, may be joined in the same suit.

We think there was no error in joining two of the defendants in the same action.

2. The plaintiff, Sigg, is denominated in the petition and writ, J. J. Sigg. The omission of his Christian name, at full length, is alleged to be error. He may have had no Christian name. He may have assumed the letters "J. J." as distinguishing him from other persons of the surname of Sigg. Objections to the name of the plaintiff cannot be taken advantage of after judgment. If J. J. Sigg was not the person to whom the promise was made, was not the partner of Theodore Nicolet and Co., advantage should have been taken of it sooner. It is now too late.

3. The petition avers that they are aliens. This averment is not contradicted on the record, and the court cannot presume that they were citizens.

4. If originally aliens, they did not cease to be so, or lose their right to sue in the federal court, by a residence in Louisiana.  
[ \* 432 ] Neither the constitution nor acts of congress require \* that aliens should reside abroad to entitle them to sue in the courts of the United States.

5. The suit not having been brought against Bedford, it was not necessary to aver or prove that he was subject to the jurisdiction of the courts of the United States.

6. The sixth objection is, that the plea to the jurisdiction was lawfully filed, and ought not to have been taken from the files of the court.

This plea was, that the firm of Theodore Nicolet and Co. consisted of other persons in addition to those named in the writ and petition, and that those other persons were citizens of Louisiana.

It is admitted that a constitutional or legal disability in the court to exercise jurisdiction over the parties, may be taken advantage of by plea in abatement, but they must be parties. If they are not, the objection is of a different character. In the case at bar, those persons who, if named as plaintiffs, might have ousted the jurisdiction of the court, were not plaintiffs. To make them so, was preliminary to any objection to them. The plea, therefore, was to be considered as objecting to the writ and petition, because all the members of the firm of Theodore Nicolet and Co. are not named. The incapacity of those members to sue, was to be considered after they became plaintiffs. If persons who ought to join in a suit, do not join in it,

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the objection is not to the jurisdiction of the court on account of their invalidity to sue, but because the proper plaintiffs have not all united in the suit. The plea is to be considered as if the averment, that Germain Musson and others were citizens of Louisiana, had not been contained in it.

This plea was offered after issue was joined on a plea in bar, and the argument of the cause had commenced. The court might admit it, and the court might also reject it. It was in the discretion of the court to allow or refuse this additional plea. As it did not go to the merits of the case, the court would undoubtedly have acted rightly in rejecting it. But it was received; and the question is, whether, after its reception, all power over it was terminated.

All the proceedings are supposed to be within the control of the court, while they are in paper, and before a jury is sworn or \* a judgment given. If so, the orders made may be revised, and such as in the judgment of the court may have been irregularly or improperly made, may be set aside. If such be the discretion of the court, this is not a case in which a supervising tribunal will control that discretion. The court very properly thought that, after issue was joined and the argument commenced, an additional plea not going to the merits, but which might defeat the action, ought not to have been received. We are not prepared to say, they exceeded their power in correcting this order and setting it aside. If they did not exceed their power, they have committed no error in this exercise of it.

7. The seventh and last error assigned is, that the plaintiffs, being parties to the insolvent proceedings, were stopped from questioning the sufficiency of the discharge.

The act of Louisiana, passed on the 20th of February, 1817, section 8, relative to the voluntary surrender of property, and to the mode of proceeding, &c., directs, when the judge shall be satisfied that the debtor is entitled to the benefit of the act, "he shall order that the creditors of said debtor be called in the manner and within the time prescribed for respites by the Civil Code, art. 4, title 16, book 3; and he shall appoint a counsellor to represent the creditors absent or residing out of the State, if there be any mentioned in the schedule."

The provision referred to is in title 18, articles 3052, 3053, 3054, in the volume in possession of the court.

The language of the code is, "the respite is either voluntary or forced. It is voluntary when all the creditors consent, &c."

"It is forced when a part of the creditors refuse to accept the debtor's proposal, and when the latter is obliged to compel them, by

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judicial authority, to consent to what the others have determined in the cases directed by law."

The forced respite takes place when the creditors do not all agree, "or then the opinion of the three fourths, in number and in amount, prevails over that of the creditors forming the other fourth, and the judge shall approve such opinion, and it shall be binding on the other creditors who did not agree to it.

But, in order that a respite may produce that effect, it is necessary

1. That the debtor should deposit, &c.

[ \* 434 ] 2. That a meeting of the creditors of such debtor, domiciliated in the State, shall be called on a certain day at the office of a notary public, by order of the judge, at which meeting the creditors shall be summoned to attend, by process issued from the court, if the creditors live within the parish where the meeting shall take place, or by letters addressed to them by the notary, if they are not residing in the parish.

It is further directed that the meeting, as well as its object, be advertised in English and in French.

It was admitted that this advertisement was made; but it is not admitted nor proved that the petitioners were summoned to attend by process from the court, or by letters addressed to them by the notary. Nor did they appear voluntarily.

Is the judgment binding on them?

It is unquestionable that summary proceedings of this description must be regular, and that their regularity must be shown by the party who relies on them. Notice to the creditors is material, and the law prescribes that notice and defines it. Advertisement in the papers is not sufficient. Personal notice must be given to a resident within the parish, by process; to a non-resident, by a letter from the notary. The law deems this notice indispensable, and the court cannot dispense with it. For want of it, the judgment of discharge was no bar to this action.

There are other irregularities in the proceedings, but want of notice is fatal, and it is unnecessary to notice them.

Judgment affirmed, with costs and damages, at the rate of six per cent. per annum.

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**ABNER L. DUNCAN'S HEIRS AND REPRESENTATIVES, Plaintiffs in Error, v. THE UNITED STATES.**

7 P. 435.

If a bond, drawn to be executed by two sureties, be signed by only one, and by him be delivered as an escrow, to operate as his deed when the other shall have signed and delivered it, he is not bound until such signature and delivery by the other surety,—*aliter*, if the first who signs delivers it as his deed.

An official bond of a paymaster, executed at New Orleans, is governed by the common law. A paymaster gave a bond to secure the faithful performance of his duty within a certain district; he was a defaulter; the presumption is, that his defalcation arose out of transactions within his district, though it appears he made some payments out of the district.

A court may change its practice without written rules; and where the question is whether it has done so, its own solemn adjudication is the best evidence.

THE case is stated in the opinion of the court.

*C. J. Ingersoll*, for the plaintiffs.

*Taney*, (attorney-general,) *contra*.

\* M'LEAN, J., delivered the opinion of the court.

[ \* 445 ]

This writ of error is prosecuted to reverse a judgment of the district court, which exercises circuit court powers, in the State of Louisiana.

In the year 1829, an action was commenced by the United States against the plaintiffs in error, on a bond given by William Carson, as paymaster, and signed by A. L. Duncan and John Carson, as his sureties. The bond bears date the 4th day of March, 1807, and contains a condition "that, if the above-bounden William Carson, paymaster for the United States of America, do and shall well and truly, according to law, perform \* and discharge the [ \* 446 ] duties of said office of paymaster, &c., within the district of Orleans, then the obligation to be void," &c.

The breach alleged in the petition was, that William Carson, paymaster, &c., "has not well and truly, according to law, discharged and performed the duties of said office for the district of Orleans; but that, on the contrary, he did, in his lifetime, receive large sums of money in his capacity aforesaid, which, although frequently requested, he refused to pay into the treasury of the United States."

The defendants in their answer say, that, "by and in said bond, it was stipulated and understood, when the same was signed by Abner L. Duncan, as security for said Carson, that one Thomas Duncan should also sign the same, as his co-surety, but that the said Thomas Duncan never did sign the same, and said bond never was completed, nor was said A. L. Duncan ever bound thereby." They also aver

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that they are not liable for the alleged defalcation in the accounts of said Carson, because he acted as paymaster out of the limits of the district of Louisiana, and the said deficiencies, if any exist, occurred without the limits of said district.

Before the jury were sworn, the defendants offered a statement to the court, for the purpose of obtaining a special verdict on the facts, in pursuance of the provisions of the 10th section of a statute of Louisiana, passed in 1817. But the court overruled the statement, and would not suffer the same to be given to the jury, for a special finding, because it was contrary to the practice of the court to compel a jury to find a special verdict. To this decision an exception was taken.

A transcript of the accounts of Carson, duly certified by the treasury department, was then given in evidence to the jury; and the judge charged the jury, that the bond sued on was not to be governed by the laws of Louisiana, or those in force in the territory of Orleans, at the time said bond was signed by A. L. Duncan, who signed it in New Orleans, in the then said territory; but that this, and all similar bonds, must be considered as having been executed at the seat of government of the United States, and to be governed by the principles of the common law. That although the copy of the

bond sued on exhibited a scrawl instead of a seal, yet they [ \* 447 ] had a right to \* presume that the original bond had been executed according to law. That the jury were bound to presume, in the absence of all proof as to the limits of the district of Orleans, that the defalcation of Carson occurred in the district of Orleans, although it was proved that he disbursed moneys, as paymaster, at Fort Stoddart and at Washington, in the territory of Mississippi; and that, if the defendant Carson had acted as paymaster beyond the limits of the district of Orleans, it was incumbent on the defendants to prove the fact. And the judge also charged the jury, that the possession of the bond by the treasury department was *prima facie* evidence of delivery,—to which charge exceptions were taken.

The jury rendered a verdict against the defendants, for \$6,126, with interest, &c.

This judgment the plaintiffs in error pray may be reversed, on the following grounds:—

1. Because the surety, Abner L. Duncan, is not bound; as, when he executed the bond, it was agreed that it should also be signed by Thomas Duncan.
2. Because William Carson was appointed paymaster for a certain district, and the judgment covers defalcations, which may have occurred out of such district.

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3. The rejection by the court of the statement of facts, on which a special verdict was prayed.

4. Because the rejection of this statement precluded the defendants from proving that the bond was delivered as an escrow.

As to the first error assigned, it appears, on an inspection of the bond, it was drawn in the names of Abner L. Duncan, John Carson, and Thomas Duncan, as sureties for William Carson, but that Thomas Duncan never signed it. There are no witnesses to the bond, but, on the day of its date, it was acknowledged by William Carson and Abner L. Duncan, before a notary public at New Orleans, and on the 21st day of May following, John Carson acknowledged it before a notary public at Harrisburg, in Pennsylvania.

To sustain this ground, reference is made to a decision of the supreme court of Louisiana, in the case of *Wells v. Dill*, reported in 1 Martin, N. S. 592. In their decision, the court say, that

\*“the defendant is sued on the ground that he signed as [ \*448 ] surety an instrument, purporting to be a bond, signed by Charles Blanchard, for his faithful performance of the duties of curator to the vacant estate of one Jared Risdon, deceased. In opposition to this action, the defendant relies principally on the want of the signature of another person to the instrument, whose name is mentioned in the body of it as co-surety. The bond is drawn in the name of Charles R. Blanchard, as principal, and the defendant and Walter Turnbull, as sureties. At the bottom, the names of Blanchard and Dill are affixed; that of Turnbull is wanting. We agree with the defendant that, under these circumstances, his signature to the obligation does not bind him. The contract is incomplete, until all the parties contemplated to join in its execution affix their names to it, and while in this state cannot be enforced against any one of them. The law presumes that the party signing did so, upon the condition that the other obligors named in the instrument should sign it; and their failure to comply with their agreement gives him a right to retract.” Pothier is cited by the court to sustain this principle.

There can be no doubt that, under the civil law, the principle is correctly stated by the court. It must be observed, however, that the court say, the want of Turnbull’s signature was principally relied on to invalidate the bond; so that there seems to have been no circumstances going to refute the presumption against its validity, arising from its face; and that the omission of the signature was not the only ground of objection to it.

It is a principle of the common law, too well settled to be controverted, that where an instrument is delivered as an escrow, or where

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one surety has signed it, on condition that it shall be signed by another before its delivery, no obligation is incurred until the condition shall happen. And if it appeared, in the present case, that Abner L. Duncan signed the bond, to be delivered on condition that Thomas Duncan should execute it, there can be no doubt the plea should have been sustained in the court below. But the delivery of the bond, as well as the signatures of the parties, is a question of fact for the jury; and this court cannot determine the legal question [ \* 449 ] arising on \*such fact, unless it be stated in a bill of exceptions. The acknowledgment of the bond by Abner L. Duncan, and afterwards by John Carson, unconditionally, and its delivery to the government, would seem to rebut the inference drawn by the plaintiffs against its validity, from the simple fact of its not having been signed by Thomas Duncan. There is, therefore, nothing upon the face of the record which would go to destroy the validity of this bond.

A question was raised, and elaborately argued by the counsel for the plaintiffs, whether this bond, having been executed at New Orleans, was not governed, not only as to the manner of its execution, but also as to the extent of the obligations incurred under it, by the principles of the civil law. In the case of *Cox et al. v. The United States*, 6 Pet. 172, decided at the last term, this question was settled.

This is an official bond, and was given in pursuance of a law of the United States. By this law, the conditions of the bond were fixed, and also the manner in which its obligations should be enforced. It was delivered to the treasury department at Washington, and to the treasury did the paymaster and his sureties become bound to pay any moneys in his hands. These powers, exercised by the federal government, cannot be questioned. It has the power of prescribing, under its own laws, what kind of security shall be given by its agents for a faithful discharge of their public duties. And in such cases, the local law cannot affect the contract; as it is made with the government, and in contemplation of law, at the place where its principal powers are exercised.

As there was no evidence before the jury that any part of the defalcation of the paymaster occurred without the limits of the district in which, as appears by the bond, he was to act; the court below might well instruct the jury that in the absence of such proof, they were bound to presume that the deficiency took place within the district.

The rejection of the special verdict by the court, is the ground which seems most to be relied on for a reversal of this judgment.

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In 1817, the legislature of Louisiana enacted, that "in every case to be tried by a jury, if one of the parties demands that \*the facts set forth in the petition and answer should [ \* 450 ] be submitted to the said jury, to have a special verdict thereon, both parties shall proceed, before the jury are sworn, to make a written statement of the facts so alleged and denied, the pertinency of which statement shall be judged of by the counsel and signed by the judge, and the jury shall be sworn to decide the question of fact or facts so alleged and denied," &c.

On the 26th of May, 1824, congress passed an act<sup>1</sup> entitled "an act to regulate the practice in the courts of the United States for the district of Louisiana; in which it is provided, that the mode of proceeding in civil causes in the courts of the United States, that now are, or hereafter may be established in the State of Louisiana, shall be conformable to the laws directing the mode of practice in the district courts of said State; provided that the judge of any such court of the United States may alter the times limited or allowed for different proceedings in the state courts, and make, by rule, such other provisions as may be necessary to adapt the said laws of procedure to the organization of such court of the United States, and to avoid any discrepancy, if any such exist, between such state laws and the laws of the United States."

This section was a virtual repeal, within the State of Louisiana, of all previous acts of congress which regulated the practice of the courts of the United States, and which came within its purview. It adopted the practice of the state courts of Louisiana, subject to such alterations as the district judge of the United States might deem necessary, to conform to the organization of the district court, and avoid any discrepancy with the laws of the Union.

By a code of the Louisiana legislature, passed in 1829, called the "Code of Procedure," the act of 1817 was repealed. This repealing act was not before the court until the present session; and a question is made under it, whether it does not, by virtue of the act of congress of 1824, change the practice of the district court. It is insisted, for the plaintiffs, that it could not have been the intention of congress, by the act of 1824, to subject the practice of the district court in Louisiana to any changes which the legislature of that State might adopt, in reference to the practice of the state courts; and the construction \* which has been given to the [ \* 451 ] act of 1792<sup>2</sup> which regulates process in the courts of the United States, is relied on as conclusive on the point. This act, by

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<sup>1</sup> 4 Stats. at Large, 62.

<sup>2</sup> 1 Stats. at Large, 275.

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reënacting the act of 1789,<sup>1</sup> adopted the "modes of process" for the district and circuit courts, which were in use at the time of its passage in the supreme courts of the respective States, but did not require, as this court have decided, a conformity to the changes which might be made in the process of those courts. Nor did the act apply to those States which were subsequently admitted into the Union. But this defect was removed by the act of the 19th of May, 1828,<sup>2</sup> which placed all the courts of the United States on the same footing in this respect, except such as are held in the State of Louisiana.

It does not appear that the district court of Louisiana, by the adoption of any written rule, has altered the practice which this court, in the case of Parsons v. Armor and Oakey, and Parsons v. Bedford and others, reported in 3 Pet. 413 and 433, considered as having been adopted by the act of 1824. But if the questions raised in these cases occurred after the act of 1817 was repealed by the code of procedure, in 1829, the fact was not known to the court. As the act of 1824 adopted the practice of the state courts, before this court could sanction a disregard of such practice, it must appear that, by an exercise of the power of the district court, or by some other means, the practice had been altered.

It is not essential that any court, in establishing or changing its practice, should do so by the adoption of written rules. Its practice may be established by a uniform mode of proceeding for a series of years, and this forms the law of the court.

In the case under consideration, it appears that the Louisiana law which regulated the practice of the district court of Louisiana has not only been repealed, but the record shows that, in the year 1830, when the decision objected to was made, there was no such practice of the court as was adopted by the act of 1824. The court refused to suffer the statement of facts to go to the jury for a special finding, because they say "such was contrary to the practice of the court."

On a question of practice, under the circumstances of this case, it would seem that the decision of the district court, as [ \* 45. ] \* above made, should be conclusive. How can the practice of the court be better known or established than by its own solemn adjudication on the subject?

In regard to the last error assigned, it is not perceived how the refusal of the special verdict precluded the defendants from proving that the bond was delivered as an escrow. Such evidence was ad-

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<sup>1</sup> 1 Stats. at Large, 93.

<sup>2</sup> 4 Ib. 278.

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missible under the plea or answer of the defendants, but it does not appear that any such was offered and rejected by the court.

The judgment of the district court must be affirmed, with costs.

11 P. 351; 5 H. 295.

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**IN THE MATTER OF THE UNITED STATES v. EIGHTY-FOUR BOXES OF SUGAR. TUFTS AND CLARKE, Claimants.**

7 P. 453.

Where the property condemned as forfeited, for an entry under a false denomination, was of greater value than \$2,000, but, if the duties were paid and deducted from the proceeds, less than \$2,000 would remain — *Held*, that the whole value of the property was the amount in dispute, and the claimant had a right to appeal.

THE case is stated in the opinion of the court.

*Mayer*, for the appellants.

*Taney*, (attorney-general,) *contra*.

\* *MCLEAN*, J., delivered the opinion of the court. [ \* 458 ]

This case is brought before the court by an application for a *mandamus*, to be directed to the judge of the court of the United States for the district of Louisiana, requiring him to allow an appeal from the judgment of that court.

\* In their petition, the claimants state that the 84 boxes [ \* 459 ] of sugar were consigned to them at New Orleans, and that, on their arrival, they were libelled by the United States for an alleged breach of the revenue laws; that the sugars were valued by the two custom-house appraisers at \$2,602.51; that they were afterwards condemned and sold by the marshal at public sale, for \$2,338.48, leaving \$2,150.06 after deducting the costs and charges of the sale.

From the judgment of condemnation the claimants prayed an appeal to the supreme court, which was refused, on the ground that the value of the sugars, exclusive of duties, is less than \$2,000.

By consent of parties, if the claimants shall, in the judgment of this court, be entitled to an appeal, the merits of the case shall be considered as regularly before the court for a final decision.

Whether the claimants were entitled to an appeal is the first point to be considered.

The decision of this question depends on the amount in controversy. If it be less than \$2,000, the judgment of the district court was final, and cannot be revised by an appeal.

The judgment of condemnation was entered on the 9th of April,

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1831, and on the 28th of the same month, under the order of the court, the marshal sold the property.

On the 19th of April, an appeal was prayed, and an order was made that the district attorney should show cause, on the 23d of the same month, why an appeal should not be granted.

In his opinion against the right of the claimants to an appeal, the district judge says that "the supreme court has lately, in the case of *Gordon v. Ogden*, decided that the defendant cannot support an appeal from a judgment obtained against him in the court below for a less sum than \$2,000, because that judgment is the only matter in dispute." "In this case," the judge says, "the thing demanded on one side was the forfeiture of a specific quantity of sugar, [ \* 460 ] and on the other the restoration of the same article, the value of which did not amount to \$2,000." "There was no demand of duties, nor could such demand have been taken into consideration in the case then before the court. There was no contest about the duties."

It will be observed that, at the time the judgment of condemnation was entered, and also when the appeal was prayed, the sugars remained in the hands of the proper officer. Suppose the judgment had been given for the restoration of the property, in what form should it have been entered? Could any part of the property have been detained for the payment of the duties? The duties were not then due, and could the court have directed them to be paid by the sale of a part of the property?

A judgment in favor of the claimants in the district court should have directed the property to be restored to them on the payment of the duties, or securing them to be paid, according to law. This would have given to the claimants the whole amount of their property, as though no seizure of it had been made. Under the law, they were entitled to a credit for the payment of the duties, on the condition of giving bond and security.

Does it not thus appear that the whole of the property was the amount in dispute, and would have gone into the possession of the claimants had the judgment of the court been in their favor? How, then, could it be said in the court below that the duties must be deducted from the value of the sugars, as forming no part of the controversy, and that by such deduction the value of the property was reduced below the amount which entitles the claimants to an appeal?

If the claimants had given bond for the payment of the duties, and a judgment of restoration had been entered by the court before any part of the duties became payable, should the court have directed

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them to be paid? Such an order, under such circumstances, would be oppressive and unjust.

The duties having been secured to the government, as the law requires, no wrongful act on the part of the officers of the government could lessen the term of credit fixed by the law and stated in the bond. And if no bond had been given, because \* of [ \* 461 ] the seizure of the property or its restoration, the claimants would have been at least entitled to a credit for the unexpired time allowed by law for the payment of the duties, on their giving the requisite bond and security.

The case must stand before this court, on the appeal, as it stood before the district court at the time the appeal was prayed. No subsequent action of the court, in the sale of the property, can affect the question. Before this court, therefore, the case must stand on the judgment of condemnation, and this before the duties were payable by law. Was not the entire property, and consequently its full value, in dispute between the parties at the time judgment was entered?

On the one side a condemnation of the property is claimed, on the ground that the revenue law has been violated; and on the other a restoration of the property is demanded. In this view, this court think the right of appeal from the judgment of the district court was clear, as the value of the property in controversy exceeded \$2,000.

The next inquiry is, whether the sugars were entered for the payment of duties under a false denomination, with a view to defraud the revenue.

The sugars were entered as brown, on which a duty of three cents per pound is paid; and the libellants contend that they should have been entered as white, on which a duty of four cents per pound is paid. The quality of the sugars can only be ascertained by a reference to the proof in the case.

The witnesses differ in their opinion as to the quality of these sugars. Bertrand and Smelser, two of the custom-house officers, say the sugars were white; and their testimony is corroborated by five other witnesses. But a still greater number of witnesses, embracing the largest importers of sugars at New Orleans, are of the opinion that the sugars were properly denominated brown by the importers. Some of the boxes appeared to be whiter than others, but by far the greater number, as it would seem from a majority of the witnesses, were brown.

J. W. Zacharie says that he is engaged in the importation of Havana sugars, and that, had he been ordered to purchase white sugar,

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he would not have purchased the sugars in question ; that if [ \* 462 ] he had entered these sugars as brown, for the \*payment of duties, he would not have considered himself as practising a fraud on the government.

A. Fiske states that he knew sugar of superior quality imported as brown sugar, and that it is very difficult beforehand for an importer to know how his sugar will be classed. He says, when the qualities of superior brown and inferior white approximate, a very fair difference of opinion may exist as to the quality.

Mr. Grant states that he has had great experience in white Havana sugar ; and, after examining the samples of the sugars shown him, says that a majority of them are brown, though there may be a few boxes of white. He would not purchase them as white, on an order for sugar of that quality.

A. R. Taylor and Joseph Cockayne state, substantially, the same facts as Mr. Grant.

Mr. Suarez says that a portion of the sugar shown him has been white, but, being very old, it has become worse than brown, and that he would not purchase it as white sugar. He considers the entire lot brown.

J. H. Shepherd states substantially the same facts. It appears that the planters in Havana mark their white sugars with the letter B, and that the mark for brown is Q; and it appears from the testimony of Bertrand, one of the custom-house officers, that he suspected a fraud was designed by the importers, as he discovered the marks on the boxes had been changed from B to Q. Two of the boxes had the letter B still on them.

Whether these changes were made by the planter or the importer does not appear ; but Fiske and other witnesses state that the marks which are placed on sugars in Havana depend very much on the fancy of the planters, and that they are sometimes marked B with the view of selling them higher.

There does not appear to be any thing in these marks which shows that a fraud was contemplated by the importers. Any such inference is rebutted by many respectable witnesses in the case, who state that the sugars are of the quality denominated in the entry.

The statute under which these sugars were seized and condemned is a highly penal law, and should, in conformity with the [ \* 463 ] \*rule on the subject, be construed strictly. If, either through accident or mistake, the sugars were entered by a different denomination from what their quality required, a forfeiture is not incurred.

Under all the circumstances of this case, the court think that the

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evidence not only fails to convict the claimants of fraud, in the entry of these sugars by a false denomination, but they think that the weight of testimony is in favor of the quality of the sugars as stated in the entry. They therefore reverse the decree of the district court, and direct said court to enter a decree that the proceeds of these sugars be restored to the complainants, if the duties shall have been paid; and if they shall not have been paid, as they are now due, that the restoration be of the balance of the proceeds, after deducting the duties.

The court think there was probable cause of seizure, and they direct the fact to be certified.

10 H. 225.

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WILLIAM TYRELL'S HEIRS, Plaintiffs in Error, v. ANDREW ROUNTREE  
and others.

7 P. 464.

Under the law of Tennessee, land having been attached on mesne process and judgment rendered by default, and the property condemned and a *venditioni* issued, the division of the county, which left part of the land in the old and part in the new county, did not prevent a sale of the whole, under the *venditioni*.

ERROR to the circuit court of the United States for the district of West Tennessee. The case is stated in the opinion of the court.

*Coxe*, for the plaintiff.

*Bell*, contra.

\* MARSHALL, C. J., delivered the opinion of the court. [ \* 467 ]

In this case the plaintiffs in error contend that the circuit court misdirected the jury, in consequence of which the verdict ought to be set aside, the judgment reversed, and a *venire facias de novo* awarded.

They had brought an ejectment for a tract of land, the title to which was shown to have been in their ancestor, but which the defendants claimed under a conveyance thereof made by the sheriff of Williamson county, in West Tennessee, in pursuance of a sale made by him under a writ of *venditioni exponas*, issued on a judgment rendered in a suit commenced by attachment.

On the 12th day of February, 1807, the attachment was regularly issued, and was levied on the 13th of the same month on the land in controversy. The defendants in the attachment did not appear, or replevy the property, but made \* default, on which [ \* 468 ] judgment was rendered on the 18th of October, 1807. On

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motion, the property attached was condemned, and a writ of *venditioni exponas* awarded, which issued on the 24th, and came to the hands of the officer on the 28th of October, 1807, who sold on the 2d of January, 1808.

The plaintiffs proved that the county of Williamson was divided on the 16th of November, 1807, and that part of the land for which the ejectionment was brought lay in the new county, called Maury. He therefore moved the court to instruct the jury that the sale was void as to that part of the land which was situated in the county of Maury at the time of the sale, and that the conveyance of the sheriff did not transfer that portion of it.

The court instructed the jury that the sale was good by relation to the levy. To this instruction a bill of exceptions was taken, and the cause is brought up by writ of error.

The counsel for the plaintiffs in error has argued the cause as if the process under which the sale was made had been the usual execution awarded on a judgment rendered against a person brought into court by regular process. Without inquiring whether his objections to the charge would have been well founded, had that been the character of the case, it is sufficient to observe that, in the actual cause, the land itself was attached. Not having been released, it remained in the custody of the officer, subject to the judgment of the court. An interest was vested in him for the purposes of that judgment. The judgment did not create a general lien on it, but was a specific appropriation of the property itself to the satisfaction of that particular judgment. The process which issued did not direct the officer to levy it on the property of the defendants, but to sell that specific property which was already in his possession by virtue of the attachment, and was already condemned by the judgment of the competent tribunal. The subsequent division of the county could not divest this vested interest, or deprive the officer of the power to finish a process which was rightly begun.

There is no error in the charge, and the judgment is affirmed, with costs.

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15 H. 467.

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THE LESSEE OF EDWARD LIVINGSTON and others v. JOHN MOORE  
and others.

7 P. 469.

The State of Pennsylvania, having liens upon lands of its debtor, by judgments and other proceedings, but there being no mode, under the existing law, of procuring payment out of the lands, passed a special act subjecting enough of the lands to sale, on process to be issued by the governor, to satisfy the debts — *Held*, that this law was not in conflict with the constitution of the United States, or with that of Pennsylvania.

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ERROR to the circuit court of the United States for the eastern district of Pennsylvania, in an action of ejectment, in which the plaintiffs claimed as heirs of John Nicholson, who was seised at the time of his death, and the defendants claimed under a sale made by the authority of the State of Pennsylvania, to satisfy a debt due to the State from Nicholson, as comptroller-general of the State. The other material facts, as well as the substance of the law of the State, the constitutionality of which the plaintiffs denied, will be found in the opinion of the court.

*Ingersoll and Taney*, for the plaintiffs.

*Binney and Sergeant*, for the defendants.

\* JOHNSON, J., delivered the opinion of the court.

[ \* 540 ]

This case comes up by writ of error from the circuit court of the United States of Pennsylvania, in which the plaintiffs here were plaintiffs there. The plaintiffs make title as heirs of John Nicholson, and the defendants as purchasers under certain commissioners, constituted by a law of that State for the purpose of selling the landed estate of John Nicholson; in satisfaction of certain liens which the State asserted to hold on his lands. The plaintiffs controvert the validity of that sale:—

1. As violating the constitution of Pennsylvania.
2. As violating the constitution of the United States.
3. As inconsistent with the principles of private rights and natural justice, and therefore void; though not to be brought within the description of a violation of any constitutional stipulation.

\* 1. To maintain the argument upon which the counsel [ \* 541 ] for plaintiffs rely, to establish the unconstitutional character of the acts under which the sale was made to defendants; the plaintiffs' counsel commenced with an effort to remove out of his way the liens, to satisfy which the legislature professes to pass the acts authorizing the same.

It appears from the record that at the time of passing the acts which constituted this board of commissioners, to wit in 1806 and 1807, the State claimed to hold four liens upon the lands of John Nicholson.

1. A judgment for special damages, amounting to £4,208 8s. entered December 18, 1795.
2. A settled account of March 3, 1796, for \$58,429.24, afterward reduced to \$51,209.22.

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3. Another settled account of December 20, 1796, for \$63,727.86.  
And,

4. A judgment confessed and entered March 21, 1797, for \$110,390, with certain special matter attached to the confession, wholly immaterial to the present controversy. The evidence of dates and circumstances might seem to lead to the opinion that the first judgment or the consideration of it was incorporated into the settlements, and that the judgment of 1797 covered the whole. But of this there is no sufficient evidence; and the several liens must, on the facts in proof, be considered as they are exhibited on the record, as substantive and independent.

By a law of Pennsylvania of February 15, 1785, settlements made by the comptroller, with certain prescribed formalities, are declared to be liens upon the real estate of the debtor, "in the same manner as if judgment had been given in favor of the commonwealth against such person for such debt in the supreme court." A right of appeal is given if the debtor is dissatisfied, with injunctions that the court shall give interest for the delay, if the appeal is not sustained; but unless such appeal is made and judgment [ \* 542 ] against the debtor, there is no provision in the law for enforcing satisfaction of the lien by sale or otherwise. It is made to be a dead weight upon the hands of both debtor and creditor, without the means of relieving the one or raising satisfaction for the other.

A great proportion of the argument for plaintiffs, both here and below, was devoted to the effect to prove that the two settlements enumerated were not subsisting liens at the time of passing the two acts of 1806 and 1807, under which the sale was made to the defendants. But from this, as a subject of adjudication, we feel relieved by the two decisions cited from the fourth volume of Yeates, since it appears that this very lien of the 3d of March, 1796, has been sustained by a decision of the highest tribunal in that State, as long ago as 1803, (Smith and Nicholson, 4 Yeates, 6,) and that again in 1805, this decision was considered, and confirmed, and acted upon, in another case in which the several applications of the principles established in the first case came under consideration. United States v. Nichols, 4 Yeates, 251.

Now the relation in which our circuit courts stand to the States in which they respectively sit and act, is precisely that of their own courts, especially when adjudicating on cases where state lands or state statutes come under adjudication. When we find principles distinctly settled by adjudications, and known and acted upon as the law of the land, we have no more right to question them, or devi-

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ate from them, than could be correctly exercised by their own tribunals.

It is proper here to notice a relaxation of this principle, into which the court below seems to have been surprised; and in which the argument of counsel in this cause, was calculated to induce this court to acquiesce. In the case first decided in the supreme court of Pennsylvania, to wit that of Smith and Nicholson,<sup>4</sup> Yeates, 8, most of the arguments made use of in this cause to get rid of the lien of the settlement, and particularly that of a repeal of the act of 1785, or a want of compliance with its requisitions, were pressed upon that court, and carefully examined and disposed of by the judges. But there have been a variety of other grounds taken in the court below in this cause, and again submitted to this court in argument, which do not appear from the report of that decision to have been brought to the notice of the state court. Such were the want of  
\* notice of the settlement; the want of its being entered in [ \* 543 ] the books of the accounting officer; the balance not being struck in dollars and cents; that the order of settlement was reversed, and as the plaintiffs' counsel proposed to establish by evidence, that it was not a final and conclusive adjustment of all the existing debits and credits between the parties. Into the examination of most of these arguments the court below has entered with a view to estimating and repelling their sufficiency, to shake the settlement in which the lien of the settlements is claimed. But we cannot feel ourselves at liberty to pursue the same course; since it supposes the existence of a revising power inconsistent with the authority of adjudications on which the validity of those liens must now be placed. The rule of law being once established by the highest tribunal of a State, courts which propose to administer the law as they find it, are ordinarily bound, *in limine*, to presume that, whether it appears from the reports or not, all the reasons which might have been urged, *pro* or *con*, upon the point under consideration, had been examined and disposed of judicially.

It is next contended that the judgment of March, 1797, had absorbed or superseded the liens of the settled accounts.

This ground they proposed to sustain by giving in evidence the journals of the house of representatives of the commonwealth, exhibiting certain reports of the register-general and of the committee of ways and means, conducing to prove that this judgment was rendered for the identical cause of action on which the settlements were founded. This evidence was rejected by the court; and that rejection constitutes one of the causes of complaint on which relief is now sought here.

But this court is satisfied that, supposing the evidence of these journals sufficient to prove the identity, and in other respects unexceptionable, establishing that fact would not have benefited the cause of the plaintiffs. On this point there is an unavoidable inference to be drawn from the case of the United States *v.* Nichols, 4 Yeates, 251, for in that case, the lien of a settlement of prior date in favor of the State, was sustained against a subsequent mortgage to the United States; although, as the case shows, there was a judgment upon the same cause of action with the settlement, of a date subsequent to the mortgage to the United States, and obtained upon an appeal from the settlement.

[ \* 544 ] \* Mr. Dallas, for the United States, argued, that this appeal suspended the lien; but no one seems to have imagined that the judgment superseded or absorbed the settlement. If to this be added what was asserted by defendants' counsel, and acquiesced in by the plaintiffs; that by the settled law of Pennsylvania, a judgment in an action of debt upon a previous judgment, does not destroy the lien of the first judgment, it puts this question at rest.

In approaching the acts of 1806 and 1807, we are then authorized in assuming that, at the time they were passed, the State held unsatisfied liens upon the lands of John Nicholson to a large amount, under the two settlements of 1776, without any legal means of raising the money by sale; and also judgments to a great amount, which by reason of the death of Nicholson, and the want of a personal representative, they were equally precluded from all ordinary means of having satisfied. Thus circumstanced, the legislature passed those acts, the professed and unaffected and only object of which was to raise, from the sale of John Nicholson's land, money sufficient to satisfy the liens of the State. In justice to the moral as well as legal and constitutional character of those laws, it is proper to give an outline of their provisions.

It is obvious from the evidence in the cause, that between the date of the settled accounts and the passing of those acts, great changes had taken place in the possession and property of the lands of John Nicholson. Whether in any or all the cases of such change of property, the tracts sold became discharged of the liens of the State or not, is not now the question; if they were, the holders were at liberty to assert their rights against the State. In this case no such discharge is set up; the tract was one that had remained the property of Nicholson. There were then three interests to be regulated; first that of a State; second that of the persons in possession; and third that of the heirs of Nicholson. That the State was not unmindful

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of the last, is distinctly shown by the offer of compromise tendered to the family before the act of 1806 was passed, and by adopting a mode of sale calculated as much as possible to avoid throwing back the purchaser upon the heirs for damages, where sales had been made by their ancestor. Hence the plan of the act of 1806 was this: first, to ascertain \*all the lands affected by the lien [ \*545 ] throughout the State; then to assess each ratably, according to the amount of the debt, instead of selling each and all as they could be discovered; at the same time allowing a discretion in the commissioners to compromise with persons claiming an interest in the lands, and to assign over an interest in the lien proportionate to the sum received upon such compromise; of course obviating so far, the necessity of a resort to a sale or to litigation.

Here there was a general offer to all persons claiming an interest in these lands, of a release from the lien, upon paying the sum thus assessed ratably and according to value; and it was only when the offer was not accepted, or where no one claimed an interest, that the general power to sell came into exercise. Nor was it then to be exercised until after a report made to the governor, and under process issuing from him; ample notice was required to be given of the sale, and a credit not exceeding four years allowed. It is true, that by the terms of these acts, the power of selling is extended to "any body of lands, late the property of the said John Nicholson, deceased, which are subject to the lien of the commonwealth, under and by virtue of process to be issued by the governor, either in gross or by separate tracts, as to them, or a majority of them, may appear most advisable;" but there is nothing which authorizes or requires the commissioners to sell all the lands of J. Nicholson, or an acre more than what is necessary to satisfy the liens; and so the words, just recited, import; since, after raising by sale enough to satisfy the liens, it could no longer be predicated of any of those lands that "they are subject to the liens of the commonwealth," in the language of the section which gives the power to sell. And it is true also, that the money is required to be paid by the purchasers into the treasury; but this is obviously a measure solely intended to secure the proceeds from again falling into dangerous hands; and if the power to sell be limited by its very nature and terms, to the raising of enough to satisfy these liens, on what ground can exception be taken to this precaution? How can it work an injury to heirs or creditors? to say nothing of a reasonable dependence upon the justice and good faith of the country to refund any surplus, supposing the commissioners were at liberty to raise a surplus by sale.

Nor can any reasonable exception be taken to the discretionary

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[ \*546 ] \*power given to sell "in gross or by separate tracts;"<sup>se</sup> when it is considered how very possible it was that sales might be effected in gross when they could not be made in detail. Speculators might not be induced to adventure otherwise, and the separation of contiguous tracts might often destroy or diminish the value of each.

After presenting this expose of the design and operation of these laws, we shall search in vain in the constitution of the State or the United States, or even in the principles of common right, for any provision or principles to impugn them; and on this point I am instructed to report it as the decision of this court, that the words used in the constitution of Pennsylvania, in declaring the extent of the powers of its legislature, are sufficiently comprehensive to embrace the powers exercised over the estate of Nicholson, in the two acts under consideration, and that there are no restrictions, either express or implied, in that constitution, sufficient to control and limit the general terms of the grant of legislative power to the bounds which the plaintiffs would prescribe to it.

For myself, individually, I must use the privilege of assigning the reasons which claim my concurrence in that opinion.

The objection made to the exercise of this power is, that it is one of a judicial character, and could not exist in the legislature of a country having a constitution which distributes the powers of government into legislative, executive, and judicial.

I will not pause to examine the question, whether the subjection of property to the payment of judgments, be in fact a matter appertaining essentially to judicial power; or whether, after deciding that the debt is due, the judgment action does not cease, and all that follows is the exercise of legislative or executive power; another view of the subject will, in my opinion, dispose of this question.

The power existing in every body politic is an absolute despotism; in constituting a government, the body politic distributes that power as it pleases, and in the quantity it pleases, and imposes what checks it pleases upon its public functionaries. The natural distribution and the necessary distribution to individual security, is into legislative, executive, and judicial; but it is obvious that every community may make a perfect or imperfect separation and distribution of these pow-

ers at its will. It has pleased Pennsylvania, in her consti-  
[ \*547 ] tution, \*to make what most jurists would pronounce an imperfect separation of those powers; she has not thought it necessary to make any imperative provision for incorporating the equity jurisdiction in its full latitude into her jurisprudence; and the consequence is, as it ever will be, that so far as her common law

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courts are incapable of assuming and exercising that branch of jurisdiction, her legislature must often be called upon to pass laws which bear a close affinity to decrees in equity. Of that character are the acts of 1806 and 1807 under consideration. The relations in which the State and John Nicholson's estate stood to each other, presented a clear case for equitable relief; a lien on the one hand, and property to satisfy it on the other, but no common law means of obtaining a sale. Thus circumstanced, is there any thing in the constitution of Pennsylvania to prevent the passing of these laws?

When it is intimated that the separation of the primary powers of government is incomplete under the constitution of Pennsylvania, it may be necessary to submit a few observations explanatory of the idea.

It is true that the separation of common law from equity jurisdiction is peculiar to Great Britain; no other of the States of the old world having adopted it. But it is equally true that in no other of the States of the old world did the trial by jury constitute a part of their jurisprudence, and every practical lawyer knows that to give jurisdiction to a court of equity, or to distinguish a case of equity jurisdiction from one of common law under the British practice, the averment is indispensable that the complainant is remediless at law. When it is said that the separation of common law from equity jurisdiction is peculiar to Great Britain; it must only be understood, that it is there exercised by distinct courts and under distinct forms. For, as an essential branch or exercise of judicial power, it is acknowledged to exist everywhere; nor is it possible for any one acquainted with its nature and character, and the remedies it affords for the assertion of rights or the punishment of wrongs, to doubt that the power to exercise it, and the means of exercising it, must exist somewhere; or the administration of justice will be embarrassed if not incomplete. To administer it through the ordinary powers of a common law court is impracticable; and hence, wherever there exists no provision \* in the juris- [ \*548 ] prudence of a country for its full exercise; the consequence must ever be, that after the common law courts have ingrafted into their practice as much as can be there assumed, the legislature is compelled to exercise the rest; or else leave a large space for the appropriate field of judicial action unoccupied.

A specimen of this will be found in the early legislation of the State of South Carolina, in which, before the establishment of a court of equity, laws are frequently found authorizing administrators or others to sell lands for the payment of debts, and for similar purposes. And it has been admitted in argument, that similar laws are of frequent occurrence in Pennsylvania.

The provisions of the constitution of that State on the subject of  
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legislative and judicial power, are as follows. Art. 1, § 1: "The legislative power of this commonwealth shall be vested in a general assembly, which shall consist of a senate and house of representatives."

Art. 4, § 1: "The judicial power of the commonwealth shall be vested in a supreme court, in courts of oyer and terminer and general jail delivery, in a court of common pleas, orphan's court, register's court, and a court of quarter sessions of the peace of each county, in justices of the peace, and in such other courts as the legislature may from time to time establish."

Art. 4, § 6: "The supreme court and the several courts of common pleas, shall, besides the powers heretofore usually exercised by them, have the powers of a court of chancery so far as relates to the perpetuating of testimony, the obtaining of evidence from places not within the State, and the care of the persons and estates of those who are *non compos mentis*; and the legislature shall vest in the said courts such other powers to grant relief in equity as shall be necessary, and may from time to time enlarge or diminish those powers, or vest them in such other courts as they may judge proper for the due administration of justice."

It is clear from these quotations, that the legislature possess all the legislative power that the body politic could confer, except so far as they are restricted by the instrument itself. It is equally clear that the constitution recognizes the distinction between common law and equity powers, and the existence of equity powers beyond [ \*549 ] what it has vested in the supreme court. But what provision has it made for the exercise of those powers? No other than this, that the legislature shall vest in the said courts such other powers to grant relief in equity as shall be found necessary. But where is the limitation prescribed to the legislature in judging of the necessity of vesting such powers? They have not thought it necessary to invest their courts with such powers; and if the reason which influenced them in judging it unnecessary was, that they held themselves competent to afford the necessary relief by the exercise of legislative power, where is the restriction in the constitution that controls them in thus extending or applying the powers with which they hold themselves to be constitutionally vested? They are sought in vain.

Again: "They may from time to time enlarge or diminish those powers, or vest them in such other courts as they shall judge proper, for the due administration of justice." Now they have, by the 1st section of the same article, the power to establish what courts they please; and suppose they thought proper to have vested the whole equity jurisdiction not specifically disposed of, in a board of commis-

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sioners, instead of vesting specific powers in such a board, where is the constitutional provision that inhibits such an act of legislation?

The plaintiffs contend that it is to be found in the bill of rights of that State, or in the constitution of the United States.

Both those constitutions contain the provision against the violation of contracts; and the plaintiffs' counsel insists that there were three contracts in existence between the State of Pennsylvania and John Nicholson, two of them express, and one implied.

The first express contract he finds in the acts of 1782 and 1785; which, in giving the lien upon public accounts, declare that they shall be liens "in the same manner as if judgment had been given in the supreme court." This he construes into a contract that they shall be enforced in the same manner as such a judgment, to wit, by judicial process; and then finds the violation of the contract, in the acts which provide for the raising of the money to satisfy those liens by the sale of the land, through this board of commissioners. But a single observation, we think, disposes of this exception; which is, that the lien of a judgment, of a mortgage, or any other lien, is a \*very different idea from that of the means by [ \* 550 ] which the lien is to be enforced; the one is the right, the other is the remedy; the one constitutes the contract, and the other the remedy afforded by the policy of the country, where it is not provided by the terms of the contract, for enforcing or effecting the execution of it. The first is unchangeable, without a violation of right; the other may be subject to change at the will of the government. And it may be further observed in the present instance, that the reference to a judgment in the supreme court is clearly descriptive or illustrative of the meaning of the legislature, with reference only to the binding efficacy of the lien given on these public accounts.

The second express contract is found by the plaintiffs in the confession of judgment on the 21st March, 1797, and the violation of this also is not enforcing it by judicial process.

This is obviously an attempt to give the character of a contract to that which is nothing more than an obligation, or duty, or necessity, imposed by the laws of society. The confession of a judgment does indeed create a contract; but it is only on the side of the defendant, who thus acknowledges or assumes upon himself a debt, which may be made the ground of an action. But on the side of the plaintiff the necessity of resorting to certain means of enforcing that judgment is not an obligation arising out of contract, but one imposed upon him by the laws of the country.

Again it may be answered, if there was in fact such a contract imputable to the State, the performance had become impossible by

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the act of God, and of the party himself, by his death ; and by that confusion of his affairs which prevented every one from assuming the character of his personal representative.

We proceed to the third, or the implied contract ; that which is deduced from the original grant of the land to John Nicholson. This sale, it is insisted, is inconsistent with that contract of grant ; that it amounts in fact to a resumption of the land ; and in connection with this, the point of inconsistency with the reason and nature of things, was argued and commented upon.

The answer which the case here furnishes we think is this ; that subjecting the lands of a grantee to the payment of his debts, [ \* 551 ] can never impair or contravene the rights derived to \* him under his grant, for in the very act the full effect of the transfer of interest to him is recognized and asserted ; because it is his, is the direct and only reason for subjecting it to his debts.

But it is asserted that in this case the community sits in judgment in its own cause, when it affirms the debt to be due for which the land is subjected to sale, and then subjects the land to sale to satisfy its own decision thus rendered.

This view of the acts of the State is clearly not to be sustained by a reference to the facts of the case. As to the judgment of 1797, that is unquestionably a judicial act ; and as to the settled accounts, the lien is there created by the act of men who, *quoad hoc*, were acting in a judicial character ; and their decision being subjected to an appeal to the ordinary, or rather the highest of the tribunals of the country, gives to those settlements a decided judicial character ; and were it otherwise, how else are the interests of the State to be protected ? The body politic has its claims upon the constituted authorities, as well as individuals ; and if the plaintiffs' course of reasoning could be permitted to prevail, it would then follow that provision might be made for collecting the debts of every one else, but those of the State must go unpaid, whenever legislative aid became necessary to both. This would be pushing the reason and nature of things beyond the limits of natural justice.

It is next contended that the acts of 1806 and 1807, are unconstitutional and void, because contrary to the 9th section of the Pennsylvania bill of rights, which provides, in the words of *magna charta*, that no one shall be deprived of his property but by the laws of the land.

This exception has already been disposed of by the view that has been taken of the nature and character of those laws. It has been shown that there is nothing in this provision either inconsistent with natural justice or the constitution of the State ; there is nothing of an arbitrary character in them.

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They are also charged with being contrary to the 9th article of the amendments of the constitution of the United States, and the 6th section of the Pennsylvania bill of rights, securing the trial by jury.

As to the amendments of the constitution of the United States, they must be put out of the case; since it is now settled \* that those amendments do not extend to the States; and [ \* 552 ] this observation disposes of the next exception, which relies on the 7th article of those amendments. As to the 6th section of the Pennsylvania bill of rights, we can see nothing in these laws on which to fasten the imputation of the violation of the right of trial by jury; since, in creating the lien attached to the settled accounts, the right of an appeal to a jury is secured to the debtor; and as to the inquest given under the execution law, with a view to ascertaining if the rents and profits can discharge the debt in a limited time, as a prelude to the right of selling; we are well satisfied that there is no more reason for extending the provision of the amendment to that inquest, than there would be to an inquest of a coroner or any mere inquest of office. The word trial, used in the 6th section, clearly points to a different object; and the distinction between trial by jury and inquest of office, is so familiar to every mind, as to leave no sufficient ground for extending to the latter that inviolability which could have been intended only for the former. The one appertains to a mere remedy for the recovery of money, which may be altered at any time without any danger to private security; the other is justly regarded in every State in the Union, as among the most inestimable privileges of a freeman.

The two remaining grounds urged for impugning the constitutionality of these laws, have been disposed of by observations already made.

It only remains to consider the point made upon the rejection of certain evidence proposed to be introduced; the object of which was to invalidate the settled accounts, by showing that, in fact, the accounts between the State and Nicholson never were settled, that is, finally and conclusively settled. Here again, as was remarked of the evidence already considered, admitting the fact proposed to be proved, what could it avail the party in this suit? As far as the accounts were settled and certified the law gave the lien for the amount certified; and why should that benefit be deferred until the last possible shilling in dispute should be finally passed upon; delayed perhaps until lost, or until the debtor could no longer parry the decision, and thus give a preference to others at his will?

If, then, the fact intended to be established by the evidence

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[ \* 553 ] \*could not have availed the plaintiffs, the court could have committed no error in rejecting it, whatever may have been the reasons given for the rejection.

We are of opinion that there is no error in the judgment below and it will accordingly be affirmed, with costs.

14 P. 540; 18 H. 71; 9 W. 278; 15 W. 229; 16 W. 125; 21 W. 557; 23 W. 149;  
2 O. 552.

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GEORGE MORRIS and DAVID Gwynne, Plaintiffs in Error, v. THE LESSEE OF JOSIAH HARMER'S HEIRS.

7 P. 554.

A *prochein amy* cannot accept a release not conformable to the decree.

Historical facts of general and public notoriety may be proved by reputation, and that reputation may be established by historical works, of known character and accuracy. But evidence of this sort is confined in a great measure to ancient facts which do not pre-suppose better evidence in existence; and where, from the nature of the transaction, or the remoteness of the period, or the public and general reception of the facts, a just foundation is laid for general confidence.

The work of a living author, who is within the reach of the process of the court, can hardly be deemed of this nature. He may be called as a witness.

The plat of the lots in the city of Cincinnati, made under the authority of the owner of the site of the city, and which had been generally recognized and used in the surveys of the lots laid down in the same, was properly admitted as evidence of reputation.

A parol exchange, of lands in Ohio, is not valid.

THE case is stated in the opinion of the court.

*Ewing*, for the plaintiffs in error.

*Caswell*, for the defendants.

[ \* 555 ] \* STORY, J., delivered the opinion of the court.

This is a writ of error to revise the judgment of the circuit court for the district of Ohio, rendered against the plaintiffs in error, who were the original defendants in an action of ejectment, commenced in that court in 1828.

The original suit is for a lot of land situate in Cincinnati. The original plaintiffs are the heirs of Gen. Josiah Harmer, and claim title to the premises under a deed executed by John Cleves Symmes, then proprietor of the lands, including the whole city, on the 6th of May, 1791, acknowledged on the 28th of November, 1804, and recorded on the 30th of the same month. The boundaries stated in the deed are as follows: "On the south on the front or river street, lying directly in front of Fort Washington, being twelve rods wide on the street, including two lots, and extending northerly from the said front street twenty rods to the south side of the second street

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from the Ohio, and adjoining the said second street twelve rods from east to west; and on the east bounded by the lands of his excellency Governor St. Clair." These lots were without the original bounds of the city. At the time when this deed was executed, Symmes had not procured a legal title thereto under his contract with the United States for his purchase; but he subsequently obtained it in 1794.

The defendants, at the trial, set up title to the premises derived under one Ethan Stone, who purchased the lands mentioned in the deed from Symmes to Harmer, at a sheriff's sale, on an execution by one Lamma against Symmes, and as his property, in March, 1803.

At the trial, there was a good deal of evidence as to the location and boundaries of the lots conveyed by the deed of Symmes to Harmer, and comprehending the premises; and this constituted one of the points in controversy. The defendants [ \*556 ] also, to rebut the plaintiffs' title, gave in evidence the record of the proceedings in a suit in chancery, prosecuted by Harmer against Stone in the supreme court of Ohio in 1811, the object of which was to procure a decree against Stone for a release and surrender of his title to these lots, under the sheriff's sale; upon the ground expressly stated in the bill, that the deed of conveyance from Symmes to Harmer, in 1791, (the former having then acquired no legal title,) conveyed only an equitable title to Harmer, and that Stone had full notice thereof at the time of his purchase under the sheriff's sale. Pending the proceedings, Harmer died, and the suit was revived in behalf of the widow and heirs of Harmer; all of whom, except one, were then under age, and prosecuted their suit by their mother as their next friend. Afterwards, in 1817, a decree was made in favor of the plaintiffs, directing Stone to release all his title to the land according to the boundaries contained in the deed from Symmes to Harmer; and to yield up the possession accordingly. The heirs of Harmer did not all arrive at age until 1825. After the rendition of this decree, one George W. Jones was employed by Mrs. Harmer to procure a release from Stone pursuant to the decree. He testified that he came to Cincinnati in 1821. That before leaving the city of Philadelphia, Mrs. Harmer requested him to take the agency of their claim in Cincinnati, then in the hands of Jesse Hunt, and to receive a conveyance from Stone of the lands decreed to the heirs of Harmer, and take possession of the same. That, at that time, all the heirs except one were minors, and with her who was of full age he had no conversation respecting the matter; nor had he any written authority to act as agent for any of them. That after his arrival at Cincinnati, he applied to Stone for a

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conveyance ; and after some difficulty and delay, he got him to go upon the ground in company with Mr. Este, the attorney-at-law for Harmer's heirs, and Mr. Gest, a surveyor, and the land was set off by Stone as he (Stone) claimed was correct. The surveyor handed him a plan of survey, and Stone executed a release of the same to Harmer's heirs. That the witness knew nothing of the situation of the town, or the true locality of the lots. He had no agency in, nor did he ever know of the additional description of the four [ \* 557 ] town lots as mentioned \* in the deed of release made by Stone ; nor did he know that it conveyed other or different ground than was described in the deed made by Symmes to Harmer.

It was also proved, on the part of the plaintiffs, that in 1824 an execution was issued against Stone, and levied upon a triangular piece of ground at the junction of Ludlow and Front streets, (part of the premises included in the deed of release of Stone, and contended to be not included in the deed of Symmes to Harmer,) as Stone's property, and bought at the sheriff's sale, in February, 1825, by one Timothy Kirby, who afterwards, in June, 1827, conveyed the same to Jones ; and Stone afterwards, in August of the same year, upon a representation that it was bought by Jones for Harmer's heirs, to quiet their title, executed a release thereof to Kirby.

It was also proved that Harmer's heirs have always been in the undisturbed possession of the land released by Stone to them, under the decree. That about the year 1821 or 1822, Josiah Harmer, one of the heirs, then a minor, but who came of age in 1823, came to Cincinnati ; and wishing to erect a house on the corner of the triangular piece of ground above referred to, contracted for the building of the same, which was erected thereon, and has ever since been in the possession and occupancy of persons holding under Harmer's heirs, and paying rent to them.

This statement of facts is necessary to understand the instructions prayed of the court, which will hereafter come under consideration. Before proceeding to consider them, it will be proper to dispose of some minor exceptions taken to certain evidence which was admitted at the trial.

It has been already stated, that one of the points of controversy at the trial, was as to the true location and boundary of the lots conveyed by Symmes to Harmer. One Thomas Henderson, a witness, among other things, testified that "he had heard a number of the old citizens of Cincinnati, now dead, speak of the situation of the lots sold by Symmes to Harmer ; and named particularly, Joel Williams, one of the old proprietors of the other part of the town, and David Zeigler, who, he said, was the reputed agent of General

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Harmer; and in the conversation spoken of, warmly censured Ethan Stone for attempting to take from Harmer his property." The defendants objected \*to the admission of Zeigler's [ \* 558 ] declaration, as to the location of said lots; which objection was overruled by the court, and the statement of said Zeigler, as testified by said witness, was admitted in evidence to the jury. The defendants excepted to the admission of this evidence.

It is observable that the exception is not general to the declarations of Zeigler, but only to that which respected the location of the lots. Nor does it appear that any declaration of Zeigler was given in evidence, except what is above stated. Now, if Zeigler made no other declaration, or the plaintiffs waived giving any other declaration in evidence, notwithstanding the court ruled it to be admissible, it is difficult to perceive how this exception can be maintained, or how the defendants have been prejudiced. As far as Zeigler's declaration is in evidence, it is merely introductory, that he spoke "of the situation of the lots;" and it nowhere appears that any further declaration, except in this general way, was in evidence. Such a statement, so utterly inconsequential, cannot form any proper matter of exception. It proves nothing; and can be considered in no other light than as the introductory language of the witness himself.

The plaintiffs then offered to read from Dr. Drake's work, called a picture of Cincinnati, the date of the surveying and laying out lots in that part of Cincinnati which lies east of the garrison reservation. To the admission of this book in evidence, the defendants objected; the author being (as was agreed) alive, and his deposition, as to other matters, taken in the cause. The court overruled the objection, and admitted the evidence to go to the jury. To this decision, also, the defendants excepted.

If this exception were to be considered solely upon the general principles of the law of evidence, we should think that it was well taken. All evidence of this sort must be considered as mere hearsay; and certainly, as hearsay, it is of no very satisfactory character. Historical facts, of general and public notoriety, may indeed be proved by reputation; and that reputation may be established by historical works of known character and accuracy. But evidence of this sort is confined, in a great measure, to ancient facts, which do not presuppose better evidence in existence; and where, from the nature of the transactions, \*or the remoteness of [ \* 559 ] the period, or the public and general reception of the facts, a just foundation is laid for general confidence. See 1 Starkie's Evid. pl. 1, § 40 to 44, pp. 60 to 64; Id. pl. 2, § 55, pp. 180, 181. But the work of a living author, who is within the reach of process of

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the court, can hardly be deemed of this nature. He may be called as a witness. He may be examined as to the sources and accuracy of his information; and especially if the facts which he relates are of a recent date, and may be fairly presumed to be within the knowledge of many living persons, from whom he has derived his materials; there would seem to be cogent reasons to say, that his book was not, under such circumstances, the best evidence within the reach of the parties.

But we think there are special circumstances in this case which exempt the evidence from the common rule, and justify its admission. Doctor Drake had been already used by the defendants as a witness in the cause, on the point as to location and boundary of the lots. He stated, among other things, that he was present when Joseph Gest, the city surveyor, made a survey of the foundation of old Fort Washington, a plat and description of which, by Gest, was then before him, and was in the case: and after stating his belief of its accuracy, and his reasons for so believing, he added: "finally, in preparing a plat of the town, for the picture of Cincinnati, in 1814, I took great pains to lay down the site of the fort correctly, and I find that the plat made by Mr. Gest corresponds almost exactly with it." And in answer to a further question of the defendants, what would be the location of four lots, the calls for which were directly in front of Fort Washington, he stated, "they must all lie between Ludlow street and Broadway, that is, west of Ludlow street." Now, these answers, which were brought out upon the defendants' own inquiries of their own witness, seem to us to justify the admission of the book of Doctor Drake, for the purpose of explaining, qualifying, or controlling his evidence. The remarks of Doctor Drake in his book, as to the date of the surveying and laying out lots in that part of Cincinnati which lies east of the garrison reservation, (and which was comprehended in the scope of his testimony,) might have been important for this purpose; and at all events, the plaintiffs might properly refer to this book to [ \* 560 ] show statements which \*might affect the results of his testimony. In this view, we think the evidence was admissible; and its bearing in any other view is not shown to have been in the slightest degree material to the cause.

The defendants subsequently offered in evidence a map contained in the same book, it being a plan of the town of Cincinnati, exhibiting the same plan of the town as that offered by the plaintiffs, except that the four first lots were not numbered. The plaintiffs then produced another plat marked No. 3, and again called Henderson, who testified that he saw the plat for the first time in 1809.

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while the depositions *in perpetuum* used in this cause were taking. That the said plat was shown to him by John C. Symmes, in the presence of Daniel Symmes. That the writing thereon, and the lines, but not the numbers, were then put upon it in the handwriting of J. C. Symmes. That in 1811 the said plat was again shown to him, at which time the figures numbering the lots were upon it, and he recognized these figures as being in the handwriting of Daniel Symmes. That he then, at the request of the proprietors and several of the old citizens of the town, copied the plat, protracting it on a larger scale, and placed his copy on the records of the county, and that the same has since governed him and all other surveyors, as far as he has known, in surveys made in that part of the town, now city of Cincinnati. That this plan was recorded for the purpose of preserving the original plan of that part of the town which was laid out by J. C. Symmes; and the inhabitants of Cincinnati have since recognized it as the true plan of the said part of the town, except Ethan Stone, then in possession of the block in which the land in controversy is situated, who denied its correctness. That this was the only plan of that part of the city known and recognized by the citizens of Cincinnati; that the size and number of the streets and alleys were determined with reference to that plan; that all the surveys of the lots, streets, and alleys in that part of the city were made with reference to that plan, so far as he knows; that he never knew of any other plan; and no other was ever adopted as the plan of the upper part of the town. The plaintiffs thereupon offered the said plat in evidence to the jury, for the purpose of showing the original plan of that part of the city. The defendants \*objected to its admission. The [ \* 561 ] court overruled the objection, and admitted the plat in evidence, directing the jury to disregard any thing written on it by J. C. Symmes. An exception was taken to this decision of the court, and the question now is upon its correctness.

We are of opinion that the plat, upon this evidence, was rightly admitted. It is to be considered, that J. C. Symmes was the original proprietor of the whole city when it was laid out; and that the plat was in his possession, and held out by him as the original plat. It was traced back to that possession more than twenty-two years before the trial, and was the oldest and only original plat known to be in existence. It was a publicly recognized plat by which the corporate authorities and citizens ascertained and regulated their surveys, lots, streets, and alleys. And having been so long and so publicly recognized, it was the highest species of evidence of reputation as to the location and boundaries of the lots, streets, and alleys; and not

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the less so because it was contested by a single individual, whose interests might be affected by it. It was not conclusive upon his rights, but it was admissible as the best proof then known to the plaintiffs of the general laying out and boundaries of the lots and streets of the city, recognized by the original proprietor and those who had succeeded to his rights, as well as by the public. But if this were even doubtful, (which we do not admit,) it would still be admissible; since it is not even pretended that it differed in any material circumstance from other plats then laid before the jury by both parties, except as to the figures numbering the lots, and these the court directed to be disregarded. The question, therefore, made at the bar, as to the admission of hearsay, *post item motam*, does not arise, and may well be left for decision until it constitutes the very point for judgment. It has, indeed, been suggested at the bar, that Symmes produced the plat after Stone had obtained his title to the premises, and, therefore, had an interest to maintain the title of Harmer, in order to escape from his warranty to the latter under his deed of 1791. But no such interest could exist; for whatever was the true location of the lots conveyed by that deed, Symmes undoubtedly had the title at the time; and Stone, not being a second purchaser by deed from Symmes, but a mere purchaser at [ \*562 ] \*a sheriff's sale on execution, could take only such title as Symmes then possessed in the premises. And the not recording of the deed to Harmer until after Stone's purchase, will not affect Harmer's title (it being clearly good between the parties) as it might have done if Stone had been a subsequent purchaser from Symmes by deed without notice. The plat, then, came from Symmes's possession at a time when he had not even a semblance of interest in the controversy.

We now come to that which constitutes the main hinge of the present suit, and by which its ultimate merits are to be decided, and that is, the instructions given and refused by the court.

The 1st instruction was prayed for by the plaintiffs, and is as follows: "The counsel for the plaintiffs move the court to instruct the jury that inasmuch as they claim title to the premises in dispute under the deed from Symmes to Harmer, and not under the deed of release made by Stone, they cannot be divested of their title to the lots which that deed conveyed to Harmer, by the possession of these premises for the period of five or six years, which they supposed to be a part of these lots, though embraced in the deed of release, but not in the decree;" which instruction the court accordingly gave. It does not appear upon the record that this instruction so given was in express terms excepted to by the defendants; the exception being

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stated in the following terms, after the instructions asked by the defendants: "The court charged the jury as requested by the defendants upon the first instruction asked by them; but refuse the residue of the instructions in manner and form as the same were prayed for; to which several opinions of the court in delivering their charge as aforesaid, the defendants except," &c. But we think that the fair import of these last words embraces the instruction asked by the plaintiffs; for that was an opinion delivered by the court in its charge to the jury.

That the deed of Symmes to Harmer, in 1791, passed a legal title to Harmer, which became consummated in the latter when Symmes obtained his patent from the United States in 1794, is not controverted. The question is, whether the subsequent proceedings under the bill in equity, in which that title is asserted to be equitable, and the release given by Stone \*under that decree, and the sub- [ \*563 ] sequent possession of the heirs of Harmer of the lands so released, do, under the circumstances, estop them from setting up their legal title against the defendants. We are of opinion that they do not.

It is very clear that Mrs. Harmer could not as *prochein ami*, during the minority of the heirs, authorize any release to be taken, which did not conform to the decree so as to make it binding upon them. In point of fact, if the evidence is to be believed, the agent never intended to take any release which did not conform to the decree; and he received it upon Stone's representation that it did so conform. And it nowhere appears from the evidence that the heirs had any knowledge of their rights and of the mistake in the release, until the present suit was brought. Unless the heirs had full knowledge of their rights, and of the mistake in the release, and with that knowledge held possession of the premises in the release after they arrived of age, they could not be deemed to have confirmed the transaction, or to have accepted the release as full satisfaction and performance of the decree.

We give no opinion what, under such circumstances, would have been the effect of such acquiescence or confirmation upon the rights of the plaintiffs derived from the decree, or whether afterwards they would be permitted to repudiate the whole transaction, and compel a new execution of the decree. Here the title, set up by the plaintiffs, is not derived from or under the decree or release, but is a legal title paramount to both. Are the plaintiffs then estopped in law to set up that title? We think not. The bill in equity does not estop them, for that bill stated the derivation of title correctly, and the decree conforms to it. Neither the title set up in the bill,

nor the decree, asserts any claim repugnant to the present claim. The decree requires Stone to convey the very land in controversy. The only difficulty is, that the bill avers the title of the plaintiffs to be an equitable instead of a legal title. But as all the facts are stated truly in the bill, it is nothing more than a mistake of law. If the defendants could rely upon that bill and decree as an estoppel, it must be because the facts therein stated are repugnant to the present title asserted by them. But such is not the posture of the case.

The plaintiffs, then, having a legal title to the premises, [ \*564 ] \*which they have never parted with by a proper conveyance, they are entitled to the instruction prayed for; unless their possession of the land under the release, not included in the decree, amounts in law to an extinguishment of their title. We know of no principle of law on which this can be maintained.

The legal title to land in Ohio can be passed only by a proper conveyance by deed, according to the laws of that State. The present is an attempt to set up a parol waiver of title by acts *in pais*; a parol acceptance of other land in lieu of that belonging to the plaintiffs. As an extinguishment or an estoppel, it is equally inadmissible. The question is quite a different one, what would be the effect of such an acceptance and acquiescence under it by the parties for a long time, as matter of evidence upon a point of disputed boundary. The instruction given involves no such consideration. It prevents the more general question, whether the possession of the released premises, precluded the plaintiffs from asserting their legal title to the land sued for. We concur with the court below in thinking that it did not.

The 1st instruction asked by the defendants having been given by the court, may be passed over without notice. The 2d, 3d, 4th, and 5th instructions are as follows:—

2. If, upon the whole evidence, the jury believes that Mrs. Harmer, the next friend of the minors in prosecuting the bill in chancery and obtaining the decree given in evidence, authorized George W. Jones to obtain the deed of release under the decree and to take possession of the lands, and that George W. Jones, under this authority, as agent for the complainant obtaining the decree, and, in conjunction with the attorney for the complainants that obtained the decree, assented to the location of the ground; and George W. Jones, as such agent, accepted a deed and took possession of the land according to the boundaries described in the deed; the lessors of the plaintiff are concluded by his acts, and the plaintiffs cannot recover.

3. If, upon the whole evidence, the jury believe that Mrs. Harmer, the next friend of the minors in prosecuting the bill in chancery and

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obtaining the decree given in evidence, authorized George W. Jones to obtain the deed of release under the decree, and to take possession of the lands; and that George W. Jones \*under [ \*565 ] this authority, as agent for the complainants obtaining the decree, and, in conjunction with the attorney for the complainants in obtaining the decree, assented to the location of the ground, and George W. Jones, as such agent, accepted a deed and took possession of the land according to the boundaries described in such deed, and continued that possession, exercising acts of ownership as agent after all the lessors of the plaintiff obtained their full age; and the defendants purchased before the lessors of the plaintiffs disavowed the acts of George W. Jones, and without any notice or knowledge of an intention of the lessors of the plaintiffs to disavow the acts of said Jones, public sale of the adjacent lands being made with the knowledge of said Jones, and no notice given by him that the lessors of the plaintiffs (he continuing their agent) had disavowed or intended to disavow his acts in locating the lands, and taking a deed for and possession thereof, the plaintiffs cannot recover.

4. That the deed of release from E. Stone to T. Kirby, and the decree from the sheriff to T. Kirby, given in evidence in this cause, for part of the lands previously released by E. Stone to the lessors of the plaintiffs, under the decree, in execution of a contract paramount to the original title of E. Stone, and decreed to be executed, did not, in law, divest the title of the lessors of the plaintiffs, previously acquired to the lands so released by E. Stone to Kirby, and conveyed by the sheriff to Kirby, and the continuance of the lessors of the plaintiff in possession of all the land released to them, under the decree, and taken possession of by George W. Jones, and retaining the title thereto, is, in law, a continued affirmation of the acts of George W. Jones as their agent, which cannot be disavowed without releasing to E. Stone, and restoring to him the possession of that fraction of the land, released under the decree which the location claimed in the first does not cover.

5. That the relation in which the defendants are proved to stand to those under whom they claim title, does not warrant the jury to infer that the defendants had knowledge that the lessors of the plaintiffs had disavowed, or intended to disavow, the location as accepted by George W. Jones.

The 2d instruction proceeds upon the ground that the authority given by Mrs. Harmer to Jones, his assenting to accept the \*release of Stone, and taking possession of the land re- [ \*566 ] leased, concluded the plaintiffs from a right to recover; although they were minors, and never personally assented thereto.

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From what has been already said, this instruction was properly refused. Mrs. Harmer had no authority to bind the heirs by the acceptance of any release, not conforming to the decree.

The 3d instruction proceeds upon the ground that the acceptance of the release by Jones, under the authority of Mrs. Harmer, and the possession of the land by Jones as agent, and continuing that possession after the plaintiffs attained full age, and until after the defendants had made their purchases of the land, without any disavowal or notice of disavowal by the plaintiffs of the acts of Jones; would preclude the plaintiffs from a right to recover. We think, for reasons already given, the law is otherwise, and therefore the instruction was rightly refused.

The 4th instruction affirms, that the release of Stone to Kirby for part of the land included in the prior release of Stone, under the decree, did not devest the legal title of the plaintiffs to the lands so released to them. So far the instruction prayed was undoubtedly correct. But it did not stop here, but proceeded to declare that the continuance of the plaintiff in possession of the land so released by Stone, under the decree, was a continued affirmation of the acts of Jones as their agent, which could not be disavowed without releasing to Stone, and restoring to him the possession of that fraction of the land released, which the decree did not cover. To this instruction there are two objections. The 1st is, that if the release to Kirby by Stone, and the conveyance by Kirby to Jones, were for the exclusive benefit of the heirs of Harmer, and to quiet their title to that fraction of land, (as the evidence in the case asserts,) no such release could be now required, since the plaintiffs would be entitled to it by an independent title. But the other is equally decisive. If the plaintiffs possess a legal title to the land in controversy, not founded on that release, it can furnish no bar to their right to recover, that there exists an equitable claim against them to surrender other land taken under that release, to which *ex aequo et bono*, they are not entitled. The instruction was, therefore, properly refused.

The 5th and last instruction proceeds upon the ground [ \* 567 ] that \* knowledge on the part of the defendants, that the plaintiffs had disavowed, or intended to disavow, the location as accepted by Jones, might vary the right of the plaintiffs to recover; and that the relation in which the defendants are proved to stand to those under whom they claim title, did not warrant the jury to infer that the defendants had that knowledge. This instruction is open to the objection, that it asks the court to decide upon a matter of fact, as to what the relation was, in which the defendants were proved to stand, to those under whom they claimed title. But the

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decisive answer is, that it asks an instruction upon a point of law, not shown to have any legal bearing upon the case. It could have no influence upon the cause if given, and might have had a tendency to mislead the jury. It was, therefore, properly refused by the court.

The judgment of the circuit court is affirmed, with costs.

14 H. 400.

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*Ex parte TOBIAS WATKINS.*

7 P. 568.

The circuit court of the District of Columbia having awarded a *ca. sa.* to collect a fine, and the defendant being in custody under that process, this court has jurisdiction to award a writ of *habeas corpus* to inquire into the legality of the imprisonment under this process, it being a case of appellate jurisdiction.

The prisoner not having been brought into court on the return term, and being held solely under the *ca. sa.* his imprisonment was illegal.

THE case is stated in the opinion of the court.

*Brent and Coxe*, for the relator.

*Taney*, (attorney-general,) *contra*.

\* STORY, J., delivered the opinion of the court.

[ \* 570 ]

This is an application to the court to award a writ of *habeas corpus* to bring up the body of Tobias Watkins, a prisoner, asserted to be illegally confined in the common jail of Washington county in the District of Columbia, under process of execution issued from the circuit court of the United States for the same district. A rule was served upon the attorney-general, to show cause why the application should not be granted; and the cause has been fully argued upon the return of that \*rule. It is admitted [ \* 571 ] that all the facts existing in the case have been laid before the court, exactly as they would appear if the *habeas corpus* had been duly awarded and returned; so that the judgment which the court are called upon to pronounce, is precisely that which ought to be pronounced upon a full hearing upon the return to the writ of *habeas corpus*, and it has accordingly been so argued at the bar.

The material facts are as follows: Watkins was tried at the May term of the circuit court, 1829, upon three several indictments found against him at that term for certain offences against the United States; and being found guilty, was upon each indictment sentenced to imprisonment for three calendar months, and to pay certain fines, to wit, on one indictment \$2,000, on another \$750, and on a third \$300, with costs of prosecution. There is no award in either of the judgments, that the prisoner stand committed until the sentence be

performed. Under these sentences Watkins was immediately committed to jail by the then marshal of the district; and upon the expiration of his office, which was after the term of imprisonment was exhausted, and the appointment of a successor, he was delivered over in jail with other persons to his successor; and he has ever since been detained in custody. The terms of imprisonment awarded by the judgments expired on the 14th of May, 1830.

On the 3d day of September, 1829, the district attorney sued for three several writs of *fieri facias*, to levy the aforesaid fines; upon which due return was made by the marshal, of *nulla bona*. Upon the 16th of February, 1830, the district attorney sued for three several writs of *capias ad satisfaciendum* against Watkins to levy the same fines, which were all returnable to the then next May term of the circuit court. By these precepts the marshal is commanded to take Watkins, and him safely keep, so that he have his body before the circuit court on the 1st Monday of May then next, to satisfy unto the United States the fine, costs, and charges. No return was made to the circuit court by the marshal according to the exigency of these writs; and nothing further appears upon the records and proceedings of the court until the 10th day of January, 1833, when [ \*572 ] the late marshal of the district made a return \*to each *capias ad satisfaciendum* as follows: “*Cepi*. Delivered over to my successor in office.”

Upon this state of the facts several questions have arisen and been argued at the bar; and one, which is preliminary in its nature, at the suggestion of the court. This is, whether, under the circumstances of the case, the court possess jurisdiction to award the writ. And upon full consideration we are of opinion that the court do possess jurisdiction. The question turns upon this, whether it is an exercise of original or appellate jurisdiction. If it be the former, then, as the present is not one of the cases in which the constitution allows this court to exercise original jurisdiction, the writ must be denied. *Marbury v. Madison*, 1 Cranch, 137. If the latter, then, it may be awarded, since the Judiciary Act of 1789, c. 20, § 14,<sup>1</sup> has clearly authorized the court to issue it. This was decided in the case *ex parte* Hamilton, 3 Dall. 17; *ex parte* Bollman and Swartwout, 4 Cranch, 75; and *ex parte* Kearney, 7 Wheat. 38. The doubt was whether, in the actual case before the court, the jurisdiction sought to be exercised was not original, since it brought into question, not the validity of the original process of *capias ad satisfaciendum*, but the present right of detainer of the prisoner under it. Upon further reflection, however, the doubt has been removed.

<sup>1</sup> 1 Stats. at Large, 81.

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The award of the *capias ad satisfaciendum* must be considered as the act of the circuit court, it being judicial process, issuing under the authority of the court. The party is in custody under that process. He is then in custody, in contemplation of law, under the award of process by the court. Whether he is rightfully so, is the very question now to be decided. If the court should, upon the hearing, decide that the *capias ad satisfaciendum* justifies the present detainer, and should remand the prisoner, it would clearly be an exercise of appellate jurisdiction; for it would be a revision and confirmation of the act of the court below. But the jurisdiction of the court can never depend upon its decision upon the merits of a case brought before it; but upon its right to hear and decide it at all. In *Marbury v. Madison*, 1 Cranch, 137, it was said, that it is the essential criterion of appellate jurisdiction that it \*revises [ \*573 ] and corrects the proceedings in a cause already instituted; and does not create that cause.

Tried by this criterion, the case before us comes in an appellate form, for it seeks to revise the acts of the circuit court. In *ex parte Bollman and Swartwout*, 4 Cranch, 75, the prisoners were in custody under an order of commitment of the circuit court; and it was held that an award of a writ of *habeas corpus* by the supreme court, was an exercise of appellate jurisdiction. On that occasion, the court said, so far as the case of *Marbury v. Madison*, 1 Cranch, 137, had distinguished between original and appellate jurisdiction, that which the court is asked to exercise is clearly appellate. It is the decision of an inferior court, by which a citizen has been committed to jail. *Ex parte Hamilton*, 3 Dall. 17, was a commitment under a warrant by a district judge; and the supreme court awarded a writ of *habeas corpus* to revise the decision, and admitted the party to bail. In *ex parte Burford*, 3 Cranch, 448, the prisoner was in custody under a commitment by the circuit court for want of giving a recognizance for his good behavior, as awarded by the court. The supreme court relieved him on a writ of *habeas corpus*. In all these cases the issuing of the writ was treated as an exercise of appellate jurisdiction; and it could make no difference in the right of the court to entertain jurisdiction, whether the proceedings of the court below were annulled or confirmed. Considering then, as we do, that we are but revising the effect of the process awarded by the circuit court, under which the prisoner is detained, we cannot say that it is the exercise of an original jurisdiction.

The grounds principally relied on to entitle the prisoner to be discharged, are: First, that the fines imposed upon him are excessive, and contrary to the 8th amendment of the constitution, which

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declares that excessive fines shall not be enforced. Secondly, that the prisoner could not be detained in jail on the *capias ad satisfaciendum* longer than the return day of the process; and he should then have been brought into the circuit court, and committed by order of the court to the custody of the marshal, for payment of the fine otherwise, by the laws of Maryland, (which is the law of this part of the district,) he was entitled to his discharge.

The first point may be very shortly disposed of. The [ \* 574 ] \*8th amendment is addressed to courts of the United States exercising criminal jurisdiction, and is doubtless mandatory to them and a limitation upon their discretion. But this court has no appellate jurisdiction to revise the sentences of inferior courts in criminal cases; and cannot, even if the excess of the fine were apparent on the record, reverse the sentence. And it may be added that, if this court possessed such a jurisdiction, there is nothing on the record in this case which establishes that, at the time of passing judgment, the present fines were in fact, or were shown to the circuit court to be excessive. This objection may, therefore, be dismissed.

The other ground is of far more importance and difficulty. At the common law, whenever a fine and imprisonment constitute a part of the judgment upon a conviction in a criminal case, the judgment, if the party is in court, is, that he be committed to jail in execution of the sentence, and until the fine is paid. If he is not then in court, a special writ of *capias pro fine* issues against him; the exigency of which is, that his body be taken and committed to jail until the fine is paid.<sup>1</sup> Unless such a *committitur* be awarded, he cannot be detained in jail in execution of the sentence. It is the warrant of the jailer, authorizing the detention of the prisoner. No *capias ad satisfaciendum*, in the form appropriate to civil cases, where the exigency of the writ is to take the body of the party and him safely keep, so that the sheriff have his body before the court at the return day of the process with the writ, is ever issued or issuable. If, therefore, the present case were to be tried by the common law, the process of *capias ad satisfaciendum*, under which the prisoner is detained, would be wholly insufficient to justify his detention.

Let us see, then, how the case stands upon the laws of Maryland, by which, indeed, it is to be governed. The act of Maryland of the 20th of April, 1777, c. 6, which seems specially applicable to the recovery of pecuniary fines and forfeitures fixed by statute, declares that, if such fines and forfeitures shall be recovered by indict-

<sup>1</sup> See 1 Chitty's Crim. Law, c. 16, p. 721; Dalton's Sheriff, c. 33, p. 159; 4 Chitty's Crim. Law, c. 16, p. 373.

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ment, the court may either commit the offender to the public jail till payment to the sheriff, or \*order execution to levy [ \*575 ] the same on the offender's lands, goods, or chattels. This act is not supposed to have any application to the present case. The act of 20th of April, 1777, c. 13, for the more speedy and effectual recovery of common law fines and forfeited recognizances, provides that, where any fine shall be enforced by any court of record for any common law offence on any person, it shall be lawful for the attorney-general, or either of his deputies, to order a writ of *capias ad satisfaciendum*, or a writ of *fieri facias*, to be issued for the recovery of the sum due thereon, on which writs such proceedings shall and may be had, as in cases where similar writs are issued on judgments obtained in personal suits. It may be here stated, that writs of *capias ad satisfaciendum* in Maryland are the same in substance in their exigency as those prescribed in the common law. In another section of the act, (§ 4,) there is a proviso that nothing therein contained shall be construed to extend to prevent the several courts, as they might heretofore lawfully do, from committing any person from the non-payment of any fine, if they shall deem it expedient so to do. This proviso completely establishes the antecedent practice in Maryland to have been like that at the common law, to commit the offender for payment of the fine, and leaves it at the discretion of the court to order it in any future case. By necessary implication, it affirms that without such order the offender is not detainable in jail for the fine.

Then came the act of 24th of December, 1795, c. 74, which, after reciting that doubts had arisen as to the issuing of a *capias ad satisfaciendum* for the recovery of fines and forfeitures, provides that it shall be lawful for the attorney-general and his deputies *ex officio*, and they are hereby directed and required, on application of the sheriff of the county, to order writs of *capias ad satisfaciendum* to be issued for the recovery of all fines and forfeitures. Another section of the act declares it to be the duty of the sheriffs to return the writ of *capias ad satisfaciendum* to the courts, to which they are returnable at the term succeeding the issuing of the same; and, wherever the sheriff shall make return that he has taken the body of the party, he shall be obliged either to acknowledge in open court the receipt of the amount of the fine or forfeiture, or to produce \*the body of the party to the court, to which the said writ [ \*576 ] shall be returned; and, in default thereof, the court, upon motion of the attorney-general or his deputy, shall order judgment against the sheriff for the amount of costs.

There is a prior act of the 25th of December, 1789, c. 42, which.

after reciting that plaintiffs are often willing to grant indulgence to defendants arrested on writs of *capias ad satisfaciendum*, but doubts have arisen, whether such indulgence can be granted without depriving the plaintiffs of the benefits of any further execution, provides that, in case of an arrest of the defendants on any *capias ad satisfaciendum*, if the plaintiffs, with the consent of the defendants, shall elect not to call the execution during the term, at which it is returnable, the plaintiff may afterwards proceed against the defendant by a new execution. This statute has reference to the practice then existing in Maryland, for the sheriff, upon the return day of the *capias ad satisfaciendum*, to produce the body of the defendant, if arrested, and for the plaintiff then to pray him to be committed. Although in its terms it applies to civil suits only, yet, from its recognizing the course of practice in Maryland, it has a material bearing upon the present controversy; for the act of 1777 expressly declares that on writs of *capias ad satisfaciendum* for fines, such proceedings shall be had as in cases where similar suits of *capias ad satisfaciendum* are issued in personal suits. And, certainly, it is in entire conformity with the exigency of the writ of *capias ad satisfaciendum*; which commands the sheriff at the return day to bring the party, if arrested, into court. Whether the practice under the *capias ad satisfaciendum* in England is different, so that the party may be detained in jail by the sheriff after the return day without producing his body in court, and a *committitur* thereon awarded by the court, it is not material to inquire; since, if there be any discrepancy, the Maryland practice must govern. The cases of *Christie v. Goldsborough*, 1 Harr. & M'H. 543, and *West v. Hyland*, 3 Harr. & Johns. 200, go strongly to affirm the practice; and the latter certainly leads to the conclusion that, if a party is arrested and brought into court on the return day, and is not then prayed in commitment, he is no longer to be detained [ \*577 ] in custody; at least, that \*case decides that a new *capias ad satisfaciendum* may issue against him, which presupposes that he is not then deemed in custody upon the old one.<sup>1</sup>

But the terms of the act of 1795, c. 74, (as has been already seen,) expressly require the writ of *capias ad satisfaciendum* for a fine to be returned into court on the return day; and the fine either acknowledged to be paid, or the body of the party produced; otherwise judgment may be entered up against the sheriff for the amount. It is clearly then his duty to produce the body. It is the very exigency of the writ; and when produced, the sheriff has performed the whole

<sup>1</sup> See, also, Evans's Harris's Entr. vol. 2, p. 313, No. 40; *Fulton v. Wood*, 3 Harr. & M'H. 99; *Dyer v. Beatty*, 3 Harr. & M'H. 219.

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duty required by the precept. If the attorney-general wishes him to be committed, he is entitled to pray a commitment to be made by the court. If he does not pray it, it is difficult to perceive upon what ground it can be maintained, that the party is any longer to be detained in the custody of the sheriff. The latter has no power to arrest the party, or to detain them except according to the exigency of the writ; and he has discharged himself of his whole duty, when he has produced the body in court. His precept, in its terms, authorizes no detainer beyond the return day. Upon what ground, then, can the court infer it?

If resort be had to the practice, as certified to us by the clerks of the Maryland courts, it is in perfect coincidence with the natural construction of the terms of the act. They assert the uniform practice upon writs of *capias ad satisfaciendum* in criminal cases to be, to bring the party into court, and then to award a *committitur*. No instance is shown in which a party has ever been held in custody after the return term, upon such a *capias ad satisfaciendum*, without a *committitur*. Such a uniform course of practice is of itself very cogent evidence of the law. The practice in this district is not shown to be different. If it has not invariably conformed to that of Maryland, it seems to have conformed to it in almost all cases. The only two cases produced to the contrary, are where the return was "cepi in jail," and the circumstances of these particular cases \*are unknown. The parties may have been already [ \* 578 ] in jail on execution, or under other sentences.

And, independent of the plain import of the writ of *capias ad satisfaciendum*, there may be sound reasons for requiring the body to be produced in court. The *capias ad satisfaciendum* may have issued irregularly; the party may have paid the fine; he may have received a pardon subsequently to its award; or he may have other matters to urge against a commitment. The remark of the court in *Turner v. Walter*, 3 Gill. & Johns. 377, 385, upon an analogous writ, is very applicable here. "It is proper and necessary," say the court, "to the security of the defendant, that it should be returned in term time, in order that he may have a day in court to protect his rights." Indeed, as the statute and the precept of the process both require this course, it is incumbent upon those who contend that it may be dispensed with, or is unnecessary, to show some ground of authority or principle upon which the argument can be maintained. We have not been able to find any.

It has been said, that where the party convicted is already in custody when the sentence is passed, the party is to be deemed in custody until the fine is paid, without any award of a commitment in the

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sentence, or the issuing of any *capias ad satisfaciendum*. We know of no authority justifying this position, either at the common law or under the laws of Maryland. On the contrary, the act of Maryland, of 1777, c. 13, plainly allows a discretion in the court to commit or not to commit, for the fine. The omission to award a commitment, as a part of the sentence, is manifestly an exercise of such a discretion. Unless a *committitur* be awarded, which can only be when the party is in a court,<sup>1</sup> there must, as has been seen, be a *capias pro fine* by the common law, and by the laws of Maryland a *capias ad satisfaciendum*, to justify his arrest and detention.

The *capias ad satisfaciendum*, then, in this case, was properly awarded. It was a necessary process to recover the fine. The difficulty is, that no return was ever made to the court at the [ \* 579 ] return day by the marshal, nor indeed until long after \* the marshal's office had expired. Watkins was never brought into court, nor committed by the order of the court. He is now held in jail, and has, ever since the return term, been held in jail solely upon the *capias ad satisfaciendum*, which became *functus officio* after the return day. He might have been arrested and detained in jail, if he had not been previously in custody, until the return day; but his detention afterwards, was not, in our judgment, justified by the process. In every view which we have been enabled to take of the case, we cannot find any principle or authority to justify his detention. Doubtless the detention has been in entire good faith, under a mistake of the law. But this cannot vary the results.

We are accordingly of opinion that the writ of *habeas corpus* ought to issue, as prayed for.

JOHNSON, J., dissenting.

This case presents two questions, one of jurisdiction; and the other on the right to relief, if we assume jurisdiction.

My opinion on the first has been so strong in the negative, that I have taken little pains to investigate the second; but I will give a brief exposition of my views on both.

On the first I have thought that it need but be stated to be decided.

The prisoner is in custody of a *capias ad satisfaciendum* issuing out of the circuit court of this district. He has been convicted of a crime, a fine has been inflicted, and this writ has been issued to recover it, as he was not required by the sentence to remain in custody until the fine was paid. It is not questioned that the process was legally issued conformably to the laws of Maryland, or contended

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1 See 1 Chitty's Criminal Law, 695, 696.

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that any ground whatever exists for discharging the prisoner; except, 1st, the excessive character of the fine, which ground this court has now decided against; and, 2dly, that upon which he is now to be discharged, to wit, that he was not on the return day of the writ brought into court, and there formally recommitted to the marshal, to be detained until the fine was paid.

Now it does appear to me that it is impossible to avoid being trussed on one horn or the other of the dilemma, with which the case was met by the attorney-general. Is this court called upon to relieve the prisoner against an act of the court, or an act of the officers of the court? If of the court, then what act has [ \* 580 ] the court done, or omitted to do, to the prejudice of the defendant? The cause of complaint is, that it has not committed him to the custody of the marshal; but the custody of the marshal is the very injury that we are now called upon to redress. Is the omission to do that which, by the terms of this application, it is acknowledged would have legally and effectually deprived him of his liberty, a matter for him to complain of? or for us to relieve him from? But suppose it is a cause of complaint that the court has erred in not doing an act which it was never called upon to do; then have they not erred in a criminal cause? And is it not, therefore, acknowledged to be beyond the limits of our appellate jurisdiction?

But the truth is, and it is impossible to controvert it, that the complaint is, and the relief sought is, against the marshal for a detention without authority. The court committed no error in issuing the process, under which the arrest was made; and if, as is now established, the process has lost its efficiency, and is no longer a justification for detaining the prisoner, it is not under the process of the court that he is detained, but without it, and therefore false imprisonment in the officer. Why did not the prisoner present this motion to the court that issued the process? to the court whose officer the marshal is, *quoad hoc.*? The reason is obvious; had the court refused to discharge him, and this application then been made here, the appeal would have been too palpably in a case of criminal jurisdiction. And yet, in that event only, would he have found a pretext for claiming of this court redress against an act of that court. At present there is no act of that court for this court to revise; for if not giving the order for commitment could be tortured into such an act, then the answer is, there never was a motion made to grant such an order; and, if holding him in custody under process, or pretext of process, issuing out of that court, can be considered as a subject of revision here; then is the court unaffected by the error, since, in terms, the motion here admits their process to have long since expired in the marshal's

hands; and surely, the court is not responsible for any thing done under color of its process, but for which the process gives no authority.

The truth is, that this is a direct interference by means of [ \* 581 ] \*the writ now moved for, between a court of the United States, and the executive officer of that court; and upon the principles of this decision, I see no reason why we may not next be called upon to issue the same writ to our Ultima Thule, the mouth of the Oregon, to bring up a prisoner under a *capias ad satisfacendum*, in order to examine whether he has paid the debt or not. Is this appellate jurisdiction; or is it the proper employment of this tribunal?

This all grows out of the case of Hamilton, 3 Dall. 17; a case on which the question was not decided, and a case which, if any one will examine the report of it, he will pronounce of very little authority. Then followed the case of Bollman v. Swartwout, 4 Cranch, 75, professing obedience to that of Hamilton; but a case which occurred in the midst of great public excitement. Next came those of Burford, 3 Cranch, 448, and Kearney, 7 Wheat. 38, *et similes multi*; and finally this, which is a distinct augury in my humble opinion of the conclusions to which we are finally to be led by precedent. I have always opposed the progress of this exercise of jurisdiction, and will oppose it as long as a hope remains to arrest it.

On the second point, I will make but a few remarks.

I have never doubted that under the writ of *capias ad satisfacendum*, by the common law, the sheriff may not only take, but detain the defendant until he was legally discharged; or that, for the purpose of authorizing a detention in his own custody, a commitment to the sheriff was unheard of. On the page of the book quoted by defendant's counsel to maintain the contrary doctrine, which precedes the page quoted, will be found an entry that explains in what cases the *committitur* is resorted to in England. It is true that this writ has its return day; and that it, in terms, requires the production of the defendant's body on that day; but practically, this exigency of the writ has received this construction: "that he have him ready to produce on that day, if so required by the plaintiff." Blackstone says, vol. 3, p. 415, "if he does not on that day make satisfaction, he must remain in custody until he does." And in the case of Hawkins v. Plomer, 2 Black. 1048, the court gives in express terms, that version to the writ. "It is the sheriff's duty, say the court, to obey the writ, and the writ commands him to take the defendant, and him safely keep, so that he may have him ready

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to satisfy the plaintiff. What figure \*would a sheriff [ \*582 ] make in England, if to an action for escape, he were to plead that he took the defendant and brought him into court on the day, &c., in the literal language of the exigency of the writ? No one would dream of justifying his not detaining the prisoner, for want of a *committitur*. But it is insisted that the common law has undergone a change under the laws and practice of Maryland.

I have seen no statute of Maryland which, either in terms or by inference, makes a *committitur* to himself necessary to justify a sheriff in detaining his prisoner under a *capias ad satisfaciendum*. It is true that, by a very humane and judicious provision, the laws of Maryland have permitted the plaintiff to indulge the defendant in execution without losing his debt; and from this the practice might naturally grow up to bring the defendant into court to await the will of the plaintiff; and the court have very properly decided, omitting the motion to remand him, did not deprive the plaintiff of his second execution; but I look in vain for any decision going to establish that the sheriff would have been liable for false imprisonment, had he taken the prisoner back to jail without a commitment.

This has been sought to be supplied by a reference to the clerks of the Maryland courts to establish a practice to that effect; but I protest against such means of getting at the law of a case, especially as to a practice of which those clerks are called to testify subsequent in date to the separation from Maryland. But I have looked into the evidence thus procured, and, even if legal, I look in vain for any evidence to support the doctrine; most of them speak doubtfully, or decline speaking at all, and the sum and substance of the certificates of the whole amount to no more than this: that if the sheriff brings the body into court, the court will, on motion, order a commitment. But this is not the point we are called upon to decide; we are called upon to decide that, without such commitment, it would be false imprisonment in the sheriff to resume the custody of the defendant. In this district, I think there has been positive evidence furnished by the defendant himself of the exercise of a discretion in the marshal, whether to bring the person of the prisoner into court or not; and therein perhaps to consult the feelings of the individual. I allude to those two instances in which the return was "cepi and defendant \*in jail." We [ \*583 ] may imagine some possible ground for lessening the pressure of these two instances; but certainly the case, as exhibited to us, furnishes no such ground.

I am opposed to the order now made.

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M'LEAN, J., dissented, on the ground that, where a defendant had been committed by the marshal on a *capias ad satisfaciendum*, before the return day of the writ, it is not the practice either in this district or in the State of Maryland, as he understood it, to bring up the defendant, that he may be prayed in commitment; but that it is the practice, under the construction of the Maryland law, where a defendant has been arrested on a *capias ad satisfaciendum*, and permitted to go at large until the return day of the writ, to bring his body into court on such day, that it may be prayed in commitment.

On consideration of the petition filed in this case in behalf of the petitioner, and of the arguments of counsel as well for the United States as for the petitioner thereupon had, it is the opinion of this court that the writ of *habeas corpus* ought to issue as prayed for. Whereupon, it is considered, ordered, and adjudged by this court, that a writ of *habeas corpus* be forthwith issued, directed to the marshal of the United States for the District of Columbia, commanding him to have the body of the said Tobias, with the day and cause of his caption and detention, immediately after the receipt of the writ, to do, receive, and submit to all and singular those things which the court shall consider concerning him in this behalf, and to have then and there the said writ with his doings thereon.

To the writ of *habeas corpus*, the marshal of the District of Columbia made the following return:—

\* 584 ] \* “To the honorable the judges of the supreme court of the United States. The marshal of the District of Columbia, in obedience to the writ of *habeas corpus* issued by the authority of your honors, now produces into your honorable court the body of Tobias Watkins, who has been in his custody ever since he came into office, delivered over to him by his predecessor, Tench Ringgold, in jail; he stating that he had been held in his custody by virtue of three writs of *capias ad satisfaciendum*, at the suit of the United States, and by virtue of a writ of *capias ad respondendum*, at the suit of one William Cox, upon which said last-mentioned writ, he, the said Watkins, had been prayed into commitment by the said Cox, and had been ordered into commitment by the honorable judges of the circuit court of the United States for the District of Columbia, sitting for Washington county, by whose authority all the said writs had been issued. That being satisfied of the correctness of the representations of his said predecessor, he continued to detain the said Watkins in custody without any complaint or alle-

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gation of any illegality or wrong in the said confinement until the rule was moved for in your honorable court, at its present term, at the instance of said Watkins, for cause to be shown by the attorney-general of the United States, why a writ of *habeas corpus* should not be granted to bring the said Watkins before your honors, together with the cause of his detention. He further shows to your honors, that since the said rule was moved for, the writ of Cox, as aforesaid, has been dismissed; and from that time to the time of his receiving the said writ of *habeas corpus*, he held him in custody by virtue only of the three writs of *capias ad satisfaciendum* at the suit of the United States, considering it improper to discharge him \* pending the deliberations of your honors upon the [ \* 585 ] legality or illegality of his detention under and by virtue of those writs last mentioned."

The relator was discharged. He was again arrested upon writs issuing on the same judgments, and on an application for a writ of *habeas corpus*, the court were equally divided in opinion.

14 P. 614; 5 H. 176; 14 H. 103; 18 H. 307; 18 W. 166, 185; 10 O. 875.

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JOSHUA SCHOLEFIELD and JOHN TAYLOR, Plaintiffs in Error, v. JESSE EICHELBERGER, SURVIVING PARTNER OF JOHN CLEMM, Defendant in Error.

7 P. 586.

The plaintiffs being British subjects, and resident in England, during the war between the United States and Great Britain, received an order from the defendants' firm, under which they purchased goods for the defendant's firm, and advanced the price to the vendors. The goods were not received by the surviving partner of the firm until after the close of the war. *Held*, that an action for goods sold and delivered would not lie against the surviving partner, and that the contract was illegal.

ERROR to the circuit court of the United States for the district of Maryland. The plaintiffs in error, who were British subjects, resident in England, brought their action of assumpsit for goods sold and delivered against the defendant, as surviving partner of the firm of Eichelberger and Clemm, American merchants, resident and doing business in Baltimore. The defence was, that the contract was illegal. It appeared that the goods in question were ordered by the defendant's firm, and purchased for them by the plaintiffs, during the war between the United States and Great Britain. It was answered by the plaintiffs, that the goods came to the possession of the surviving partner after the ratification of the treaty of peace;<sup>1</sup> and that

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<sup>1</sup> 8 Stats. at Large, 218

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if the original contract was void, a new and valid contract was implied from the reception of the goods. And further, that the entire correspondence between the parties was carried on by cartel ships, and the letters were inspected by the agent appointed by the President of the United States to superintend those ships, and that the secretary of state was aware of his practice to pass all commercial correspondence.

The court instructed the jury that the plaintiffs were not entitled to recover.

*Donaldson and Taney*, for the plaintiffs in error.

A printed argument was submitted to the court by *R. Johnson* and *R. B. Magruder*.

[ \* 592 ]    \*JOHNSON, J., delivered the opinion of the court.

The action here is assumpsit to recover the balance of an account current against Eichelberger, survivor of Eichelberger and Clemm, the latter having died during the war. The defence is, that the contract was made during the war, and therefore void.

[ \* 593 ]    \*The doctrine is not at this day to be questioned, that during a state of hostility, the citizens of the hostile States are incapable of contracting with each other. For near twenty years this has been acknowledged as the settled doctrine of this court, and in a case which proves it to be a rule of very general and rigid application. *The Rapid*, 8 Cranch, 155. Even the exception commonly quoted of ransom bonds, has been shown, I think, in the case of *Potts v. Bell*, 8 T. R. 548, to be no exception, since it grows out of a state of war; is, *ex vi termini*, a contract between belligerents, and from its nature carries with it the evidence of the fidelity of the parties to their respective governments. To say that the rule is without exception would be assuming too great a latitude. The question has never yet been examined, whether a contract for necessaries, or even for money to enable the individual to get home, would not be enforced; and analogies familiar to the law, as well as the influence of the general rule in international law, that the severities of the war are to be diminished by all safe and practical means, might be appealed to in support of such an exception. But, at present, it may be safely affirmed that there is no recognized exception but permission of a State to its own citizen, which is also implied in any treaty stipulation to that effect entered into by the belligerents.

Nor do the learned gentlemen who argued this cause controvert the general rule; they only attempt to except this case from its application: 1st, by an imputed permission on behalf of the United

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States; 2d, by shifting the creation of the contract from the date, which appears on its face, to the time of delivery of the goods; which, in point of time, were not shipped until after the peace.

On the first of these grounds of exception there is a very strong case on record, to show that such a relaxation of the laws of war is not to be inferred from ordinary circumstances, if indeed it may be inferred at all; it is the case of the Count de Wohrenzoff, decided by the lords of appeal in the year 1781. It was the case of an importation of French wines from Bordeaux into Ireland, during the war of our Revolution, and the evidence to justify it was, that the trade in wines between Dublin and Bordeaux had been going on from the commencement of the war, openly and without interruption from the officers of the customs; nay, that an additional duty had been imposed \* upon their importation since the commencement [ \* 594 ] of the war. Yet they were condemned, and their condemnation affirmed. These circumstances are infinitely stronger than those relied on in this case; since the permit to carry on commercial correspondence during the war cannot reasonably imply more than to sanction an innocent correspondence; a correspondence leading only to legal results, not having for its objects any unpermitted acts, or acts inconsistent with the relation of members of hostile States.

It will be perceived here that the court does not deny the power of belligerent States so to modify the relations of a state of war as to permit commercial intercourse or other intercourse according to their will. They who give the law may modify it, and except from its operation whatever ground they choose to declare neutral. The language of jurists is uniform on this subject; and reason, policy, and humanity sustain the exercise of such a power.

The second ground of exception relied on by the plaintiffs suggests several considerations.

It is insisted, that the goods having been shipped subsequent to the war, and coming to possession of the survivor of Eichelberger and Clemm, constituted a sufficient ground of contract, without reference to the time of purchase, the delivery raising the contract for payment, and the receipt by the survivor being the receipt of the firm to which it was shipped.

1. Had the articles of copartnership, or the terms of it, if entered into without written articles, appeared upon the bill of exceptions, the court would have been called upon to consider this exception, with reference to the terms of those articles. There is no doubt that the liability of a deceased copartner, as well as his interest in the profit of a concern, may by contract be extended beyond his death;

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but without such stipulation, even in case of a copartnership for a term of years, (3 Madd. 245,) it is clear that death dissolves the concern. In the absence of proof to the contrary, we can only take this as the case of a general association, without articles extending it beyond the life of Clemm, and then the shipment having been made after his death, and no part of the proceeds having ever come to his use, the case furnishes no ground for charging his estate.

[ \* 595 ] \* 2. But this is not the true ground on which to place this question. The consideration fatal to the claim of the plaintiffs, that the letter on which these advances were made was in itself a nullity, and could not be made the basis of a contract, on which this court would entertain a suit; the purchases made under it could add nothing to its validity, nor were these goods ever the property of these plaintiffs, for they were purchased for these defendants, and finally shipped to them as their goods, not those of the plaintiffs. The plaintiffs advanced the money; with them the contract was for money paid and expended, but in the purchase and sale of the goods they were but the agents, carrying into effect a contract between the seller and these defendants. Hence the insurance against fire, No. 1, for the loss would have been that of defendants, not of plaintiffs.

These considerations leave no doubt upon the mind of this court that the decision of the court below was correct.

The judgment is affirmed.

2 H. 560.

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RICHARD M. SCOTT, Plaintiff in Error, *v.* EZRA LUNT'S ADMINISTRATOR.

7 P. 596.

The personal representatives of the lessee are liable on his covenant to pay rent, though he assigned the lease in his lifetime.

A fee farm rent is an estate of inheritance, and the assignee may sue for it in his own name, though the reversion, or the right of reentry, were not assigned to him.

THE case is stated in the opinion of the court.

[ \* 602 ] \* *Swann*, for the plaintiff in error.

*Jones*, for the defendant.

STORY, J., delivered the opinion of the court.

This cause comes before us upon a writ of error to the circuit court for the District of Columbia, sitting in Alexandria.

The original suit is an action of covenant brought by Scott, as assignee, to recover the amount of certain rents alleged to be due

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and in arrear from the defendant, since the death of his intestate, under an indenture stated in the pleadings. The defendant pleaded in the first place that he had not broken the covenants in the deed, after which plea issue was joined. Afterwards, a general demurrer was put in to the declaration; which being joined by the plaintiff, was, upon the hearing, overruled by the court. Afterwards the plea of *plene administravit* was put in, which was withdrawn, and the cause was finally tried upon another plea; which, after oyer of the indenture, stated, that "before the days in the declaration specified for the payment of the rent to the plaintiff under the said deed, that is to say, on, &c. the plaintiff, under and by virtue of the condition of reentry in the deed contained, did enter into the premises thereby demised, for non-payment of certain rent then in arrear and unpaid, and held and occupied the same as vested in him by the said entry as his absolute estate;" upon which plea issue being joined, the jury found a verdict for the defendant. \* A bill of [ \* 603 ] exceptions was taken at the trial, which will presently come under consideration, as matter assigned for error.

The indenture referred to was made on the 8th of August, 1799, between General George Washington and Martha his wife, of the one part, and Ezra Lunt, the defendant's intestate, of the other part. It purports, on the part of General Washington, to grant to Lunt, his heirs and assigns forever, a parcel of land in Alexandria; he, Lunt, his heirs and assigns, yielding and paying for the same on the 8th day of August yearly, unto General Washington, his heirs and assigns, the sum of \$73. And Lunt, and his heirs and assigns, covenant with General Washington, his heirs and assigns, that he, his heirs and assigns, will yearly and every year forever, well and truly pay the aforesaid sum of \$73 to General Washington, his heirs and assigns on the day and at the time appointed for payment; and that it shall be lawful for General Washington, his heirs and assigns, at all times after the rent shall become due, to enter upon the premises, and distress and sale make of the goods and chattels found thereon, to satisfy the rent in arrear. And Lunt, his heirs and assigns, further covenant with General Washington, his heirs and assigns, that if the yearly rent or any part thereof, be behind or unpaid for the space of 30 days after the same becomes due and payable, and sufficient goods and chattels of Lunt, his heirs and assigns, shall not be found upon the premises to pay and satisfy the same, it shall be lawful for General Washington, his heirs and assigns, to reenter and hold the same again, as if the indenture had never been made. And then follows a covenant of general warranty on the part of General Washington, his heirs and assigns.

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The executors of General Washington, by virtue of powers given by his will, on the 25th day of August, 1804, by indenture, after reciting the substance of the indenture, assigned and granted unto Henry S. Turner, his heirs and assigns, the said rent by the following descriptive terms: "the aforesaid annual rent of \$73 issuing out of and charged on the aforesaid piece or parcel of ground, herein before described." There are no words in this indenture assigning over the

rights, powers, and remedies, given by the former indenture, [ \* 604 ] by distress and reentry, or the residuary interest in \*the premises resulting from such reentry. Turner, by another indenture on the 25th of February, 1808, assigned and granted the same rent unto the plaintiff, (Scott,) his heirs and assigns, with the powers of distress and reentry, and all the covenants and stipulations in the original indenture. But it is manifest, that he could not convey them, unless he had already taken them under the assignment made to him by the executors. The declaration too is founded solely upon the assignment and transfer of the rent, and contains no allegation of any assignment of the collateral rights and remedies and interests 'in the estate.

Under these circumstances, it is contended, that whatever might be the fate of the bill of exceptions, if the action were otherwise unobjectionable, the plaintiff, upon his own showing, has no title to recover: first, because the rent is a mere chose in action, which cannot be transferred by itself to the assignee, so as to entitle him to sue therefor in his own name: and secondly, because no suit is maintainable against the defendant as administrator, for the rent in arrear, since Lunt's decease, as there is neither privity of estate, nor of contract, between him and the plaintiff. It is added, that Lunt, in fact, in his lifetime, assigned over his estate in the premises, and that his administrator is not responsible for any rent subsequently accruing and in arrear. But this fact nowhere appears upon the pleadings; and if it did, it would not help the defendant: for it is firmly established, that upon a covenant of this sort, the personal representatives of the covenantor are liable for the non-payment of the rent after assignment, although there may also be a good remedy against the assignee.<sup>1</sup> The laws of Virginia have not, in this respect, narrowed down the responsibility existing by the common law in England, at the emigration of our ancestors.

Whether the plaintiff as assignee of the rent, not being assignee also of the estate, in the premises, or of the right of reentry, can

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<sup>1</sup> See Comyn's Dig. Covenant, C. 1; Bacon, Abridg. Covenant, E. 1, 4; Barnard v. Godscall, Cro. Jac. 309; Orgill v. Kemshead, 4 Taunt. 642.

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maintain the present suit, is quite a different question. If he had been the assignee of the estate, or of the right \* of [ \* 605 ] reentry, as well as of the rent, he would clearly be entitled to maintain it; for the laws of Virginia are in this respect coextensive with those of England. The common law of England, and all the statutes of parliament made in aid of the common law prior to the 4th year of the reign of king James I which are of a general nature, and not local to the kingdom, were expressly adopted by the Virginia statute of 1776;<sup>1</sup> and the subsequent revisions of its code have confirmed the general doctrine on this particular subject. The very point was decided in *Havergill v. Hare*, Cro. Jac. 510. There A being seised of an estate in fee, by indenture granted to B his heirs and assigns, a fee farm rent with a clause of distress; and covenanted to levy a fine to uses, for securing the payment of the rent; so that, if the rent should be in arrear, B his heirs and assigns might enter into the land, and enjoy the rents thereof, until the rent in arrear should be paid to them; and B assigned, by a bargain and sale to C the rent, "with all the penalties, forfeitures, profits and advantages, comprised in the indenture." The fine was levied, the rent was in arrear, and C entered, and brought *ejectione firmæ*; and a special verdict having been found, stating the above facts, one question was, whether this contingent and future use, to arise upon non-payment of the rent, was transferable over to C, by the bargain and sale. It was strongly urged by the defendant's counsel, that it is a matter in privity and possibility only, which is not transferable before it falls *in esse*. But all the justices resolved, that it being a matter of inheritance, and being for the security for the payment of the rent, and waiting upon the rents, might well be transferred with the rent; and by the grant of the rent, the penalty and advantage well passed. But if it had been a mere possibility, not coupled with any other estate, then it had not passed. This case is full to the purpose that such a right of security is capable of being transferred, with the rent, by apt words; and even so transferred, gives the assignee a legal title both to the rent and the attendant remedies. It leaves, however, the point untouched, whether the mere transfer of the rent, without any transfer of the right of entry, (as in the present case,) would give the \* assignee a right to maintain [ \* 606 ] an action for the rent, seeing it is not knit by any priority of right or estate to the premises. Upon full consideration, however, we are of opinion that the assignee of a fee farm rent, being an estate of inheritance, is upon the principles of the common law entitled to

<sup>1</sup> See 1 Virginia Revised Code, c. 88, p. 185, edition of 1819.

sue therefor in his own name. It is an exception from the general rule, that choses in action cannot be transferred; and stands upon the ground of being, not a mere personal debt, but a perdurable inheritance. Thus, if an annuity is granted to one in fee, although it be a mere personal charge, yet a writ of annuity lies therefor by the common law; not only in favor of the party and his heirs, but of their grantee. So the doctrine is expressly laid down by Lord Coke, Co. Litt. 144, b, and he is fully borne out by authority:<sup>1</sup> and in like manner for a rent granted in fee and charged on land, a writ of annuity also lies in favor of the assignee, at his election.<sup>2</sup>

And since the statute of 32 Henry VIII. c. 34, covenants of this sort running with the estate or inheritance, are transferable to the assignee with a full right to the benefit thereof. So that there is no difficulty upon principles of the common law, in giving effect to the present action. Whether the present plaintiff has any right to reentry is a very different question, upon which in the present posture of this case it is unnecessary to give any opinion. It is clear, by the common law, that a right of reentry always supposes an estate in the party; and cannot be reserved to a mere stranger. So the law was laid down by the twelve judges, in *Smith v. Packhurst*, 3 Atk. 135, 140; and Lord Chief Justice Willis, on that occasion, in delivering their opinion, said: "therefore I have always thought, that if an estate is granted to a man reserving rent, and in default of payment a right of entry was granted to a stranger, it was void." What effect the statute of 32 Henry VIII. c. 34, or the provisions of the revised code of Virginia, may have upon this point, is a question not now before us.

We proceed, then, to the consideration of the bill of exceptions. \* Two instructions were prayed by the plaintiff, and one by the defendant. The latter was given by the court, and, with reference to the state of the pleadings, we see no objections thereto; the difficulty is in the refusal of the 2d instruction prayed by the plaintiff. It is as follows: "The plaintiff prayed the court to instruct the jury that the time at which the reentry ought to be made, depended upon the lease given in evidence by the plaintiff as aforesaid, and could not be varied by the evidence given as aforesaid by the defendant; and that if they found that a reentry had been made, that it ought to be such as would conform to the deed; and that a mere occupation of the premises by a landlord or his agent,

<sup>1</sup> See Co. Litt. 144, b, Hargrave's note, 1; *Gerrard v. Boden, Hetley*, 80· Mound's case, 7 Co. 28, b; 1 Thomas's Co. Litt. 448, note F and 449, note (9); *Bac. Abridg. Annuity, C, Com. Dig. Annuity, E.*

<sup>2</sup> Co. Litt. 144, b.

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or the receipt of rents of the premises, did not of themselves amount to a reentry." The court refused to give the instruction, being of opinion that it was competent for the said Schofield, the actual tenant, to waive any of the formalities required by law for his benefit.

Now, however correct may be the opinion of the court of this right of waiver upon general principles, still, the question is, whether with reference to the actual terms of the pleadings and issue before the jury, the instruction prayed for was not such as ought, upon principles of law, to have been given. It is wholly immaterial, whether the pleadings might not have been so framed upon the facts as to have presented a complete defence to the action. The instruction prayed has reference to the pleadings in the case. The averment there is, that the plaintiff entered on the premises under and by virtue of the condition of reentry in the original deed, mentioned, for non-payment of the rent; and upon the issue joined, this was the material inquiry. It is clear that, upon such an issue, no entry not conforming to that deed, and no evidence of an entry varying from it, would be admissible to support it. The sufficiency of the evidence before the jury to support the issue was properly left for their consideration. But the defendant had a right to the instruction, that the proof must conform to the allegations in the pleadings. For these reasons we are of opinion that the circuit court erred in refusing the above instruction; and the judgment must on this account be reversed and a *venire facias de novo* be awarded.

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WALTER BRASHEAR, Appellant, v. FRANCIS WEST, THOMAS M. WILMING, AND HENRY NIXON, Executors of JOHN NIXON, deceased, AND HENRY NIXON, SAMUEL MIFFLIN, AND JOHN LAPSELEY, Assignees of FRANCIS WEST, Appellees. FRANCIS WEST, HENRY NIXON, surviving Executor of JOHN NIXON, deceased, AND HENRY NIXON, SAMUEL MIFFLIN, AND JOHN LAPSELEY, Assignees of FRANCIS WEST, Appellants, v. WALTER BRASHEAR, Appellee.

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An assignment by a debtor of all his property for the benefit of his creditors is not presumptively fraudulent.

In Pennsylvania, such an assignment is not made void by a clause which excludes all from its benefit who do not release the debtor within ninety days.

If a party who sues out a process of attachment consents that the garnishee may sell the merchandise in his hands, he becomes responsible to the debtor for any loss arising therefrom.

THE case is stated in the opinion of the court.

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*Bibb*, for the appellant, Walter Brashear.

*Sergeant and Peters*, for the appellees.

[ \* 609 ]. \* MARSHALL, C. J., delivered the opinion of the court.

These are appeals from a decree pronounced in the court of the United States for the seventh circuit and district of Kentucky, on a bill filed by Walter Brashear, on which an injunction was awarded to stay proceedings on two judgments obtained against him in that court, by Francis West. The final decree perpetuated

the injunction as to the sum of \$4,011.68, the supposed

[ \* 610 ] \* amount of a judgment obtained against the complainant as special bail for West, and dismissed the bill as to the residue, with ten per cent. damages thereon. Both parties have appealed to this court.

Francis Brashear, the plaintiff, a resident of Kentucky, being in Philadelphia, executed two notes on the 28th of February, 1807, to Francis West, a citizen of Philadelphia, for \$3,527.82 each, payable fifteen months after date. On the 13th of July, 1808, he executed a paper writing, in Kentucky, acknowledging the balance of an account due from himself to West, amounting to \$2,147.76.

The two notes, executed in February, 1807, were assigned soon after their date to John Nixon of Philadelphia, as collateral security for a debt due from West to him.

On the 21st of April, 1807, West assigned all his estate to trustees to be sold, and the money paid, first to certain preferred creditors, and afterwards to his creditors generally; with a proviso that no creditor should be entitled to receive any dividend who should not, within ninety days from the date of the deed, execute a release of all claims and demands upon the said Francis West, of any nature or sort whatsoever.

The plaintiff was also indebted to James Latimer of Philadelphia, to whom he consigned a quantity of ginseng, with instructions to pay the proceeds, after discharging his own debt, to certain other creditors of the consignor, *pro rata*.

On the 10th of December, 1808, James Latimer, to prevent other creditors, as he alleges, from obtaining a prior lien on the property in his hands, sued out a foreign attachment against the effects of Brashear, summoning himself as garnishee, and requiring bail in the sum of \$8,000. He gave immediate notice of this proceeding to Brashear.

Early in the year 1809, he took a large part of the ginseng to himself, as purchaser, at six months' credit; which he shipped on his own

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account to China, in March of that year. In the following May he shipped the residue, on account of himself and William Redwood.

On the 11th of March, 1809, Francis West sued out a foreign attachment to the use of his assignees, against Brashear, and \*summoned Latimer as garnishee. The process was [ \*611 ] executed the 7th of April.

On the 23d of September, 1809, an attachment was sued out by Nixon's executors, which was returned executed on the 9th of October.

The attachments sued out in the name of West, by his assignees, and by Nixon's executors, were prosecuted to judgment.

In August, 1811, James Latimer became insolvent, and assigned all his property for the benefit of his creditors. His debt to Brashear amounted to \$4,985.35; no part of which could be collected, his whole estate being absorbed by preferred creditors.

Suits were instituted, in the name of Francis West, on the notes assigned to John Nixon, and on the acknowledged account hereinbefore mentioned, in the circuit court of the United States for the district of Kentucky, and judgments obtained thereon. A bill was filed by Walter Brashear to be relieved from these judgments.

A bill alleges that the assignment to Nixon, and also that to Mifflin and others, trustees for general creditors, are fraudulent and void. It also alleges that in September, 1808, the plaintiff had become special bail for the said Francis in a suit instituted against him in one of the courts of Kentucky, by a certain George Anderson, in which judgment was obtained against him, and afterwards against the plaintiff as his special bail, for the sum of \$4,011.68. That on the 3d day of November, 1808, the said Francis West received for the plaintiff \$120, from the commissioner of loans in the city of Philadelphia, on account of the claim of William Bush; to which the plaintiff was entitled. And that the said Francis West was responsible for the money lost by the plaintiff in the hands of James Latimer; that loss having been caused by the attachments sued out to attach his effects in the hands of the said Latimer, and by the negligent and illegal manner in which the said attachments were prosecuted.

The answers admit that the assignment to Nixon was made for the purpose of securing a debt due to him, amounting to \*rather more than \$2,000. They insist that the assignment [ \*612 ] to Mifflin and others, for the benefit of the creditors of West, was fair and legal; and that Brashear had notice of it before he became special bail for West at the suit of Anderson.

They contend that the attachments were legal, and were conducted regularly, and without fraud.

James Latimer, who was sworn as a witness, deposes that he shipped part of the ginseng on his own account, before the attachments were laid by the assignees of West; and that he shipped the residue after the attachment sued out by Mifflin and others, trustees for the creditors, had been served. He says there was not any collusion, agreement, or consent between the executors of Mr. Nixon, or the assignees of Mr. West and himself, that the property or money attached should remain in his hands, should be shipped abroad, or used or disposed of in any way; other than the consent of the assignees of Mr. West, that the ginseng might be sold; which consent was after their attachment, and before that of Mr. Nixon's executors; nor was there any consent on the part of the said assignees or executors to any delay or procrastination of payment on his part.

The court admitted and allowed the claim to a set-off for the money paid by the plaintiff as special bail for West, at the suit of Anderson, but rejected the other claims.

It is admitted that Nixon's executors have no interest in the notes assigned to their testator, beyond the debt intended to be secured; and to that extent their claim cannot be controverted. The suggestions made in the bills against it, are unsupported; and are denied in the answer.

The first inquiry is into the validity of the general assignment to Mifflin and others, trustees for the creditors of West.

This instrument conveys to Samuel Mifflin, John Lapseley, and Henry Nixon, all his estate, real, personal, and mixed, in trust to sell the same as soon as conveniently may be, and to collect all debts due to the said West, and to pay and discharge the debts due from him, first to certain preferred creditors, and afterwards to creditors generally; "provided, nevertheless, that none of the above described creditors shall be entitled to receive any part or dividend of the property hereby conveyed, or its proceeds, who shall not, within [ \* 613 ] ninety days from the date \* hereof, sign and execute a full and complete release of all claims and demands upon the said Francis West, of any nature or sort whatsoever."

This deed was executed on the 21st day of April, 1807; was acknowledged before the mayor of the city of Philadelphia on the 22d, and was recorded in the proper office of the city and county on the 27th of the same month. Its validity appears never to have been questioned in the State of Pennsylvania.

The objections made to it in argument are:—

1. That the creditors were not consulted.

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2. That they do not appear to have assented to the deed.
3. That possession was not delivered.
4. That the assignment is in general terms.
5. That it excludes all creditors who shall not, within 90 days, execute a release of all claims and demands on the said Francis West, of any nature or sort whatsoever.

1. It is not necessary to the validity of a deed of assignment that creditors should be consulted, though the propriety of pursuing such a course will generally suggest it, where they can be conveniently assembled. But be this as it may, it cannot be necessary that the fact should appear on the face of the deed. Had it been material, it ought to have been suggested in the bill. The fact would then have been put in issue, and might have been proved.

2. The same answer may be given to the second objection. The bill does not allege the refusal of the creditors to assent to the deed of assignment. That fact is not put in issue. The acceptance of the trust by the trustees, and the acquiescence of the creditors for more than twenty years, afford presumptive evidence in favor of their assent; and that is sufficient, in a case in which it is not made a subject of direct inquiry by the pleadings.

3. The real estate passed by delivery of the deed. The claims on Brashear were not objects of delivery. They could be assigned only in equity; and notice, when given, consummated the assignment. The question of delivery is not made in the proceedings. It is not alleged that West retained possession of any part of the property conveyed in the deed. Fraud may be given in evidence, but is not to be presumed.

\* 4. It is also objected that the assignment is in general [ \* 614 ] terms, and that no schedule of the property is annexed.

That a general assignment of all a man's property is, *per se*, fraudulent, has never been alleged in this country. The right to make it results from that absolute ownership which every man claims over that which is his own. That it is a circumstance entitled to consideration, and in many cases to weighty consideration, is not to be controverted. If a man were to convey his whole estate, and afterwards to contract debts, there would be much reason to suspect a secret trust for his own benefit. The transaction would be closely inspected, and a sweeping conveyance of his whole property would undoubtedly form an important item in the testimony to establish fraud. So, in many other cases which might be adduced. But a conveyance of all his property for the payment of his debts, is not of this description. It is not of itself calculated to excite suspicion. Creditors have an equitable claim on all the property of their

debtor; and it is his duty, as well as his right, to devote the whole of it to the satisfaction of their claims. The exercise of this right, by the honest performance of this duty, cannot be deemed a fraud. If transferring every part of his property, separately, to individual creditors in payment of their several debts, would be not only fair but laudable, it cannot be fraudulent to transfer the whole to trustees for the benefit of all.

In England, such an assignment could not be supported, because it is by law an act of bankruptcy, and the law takes possession of a bankrupt's estate and disposes of it. But, in the United States, where no bankrupt law exists for setting aside a deed honestly made for transferring the whole of a debtor's estate, for the payment of his debts, the preference given in this deed to favored creditors, though liable to abuse, and perhaps to serious objections, is the exercise of a power resulting from the ownership of property, which the law has not yet restrained. It cannot be treated as a fraud.

5. The 5th and most serious objection is, that the deed excludes all creditors who shall not, within 90 days, execute a release of all claims and demands on the said Francis West, of any nature or kind whatsoever.

[ \* 615 ] \* The stipulation cannot operate to the exemption of any portion of a debtor's property from the payment of his debts. If a surplus should remain after their extinguishment, that would be rightfully his. Should the fund not be adequate, no part of it is relinquished. The creditor releases his claim only to the future labors of his debtor. If this release were voluntary, it would be unexceptionable. But it is induced by the necessity arising from the certainty of being postponed, to all those creditors who shall accept the terms by giving the release. It is not therefore voluntary. Humanity and policy, however, both plead so strongly in favor of leaving the product of his future labor to the debtor, who has surrendered all his property, that, in every commercial country known to us, except our own, the principle is established by law. This certainly furnishes a very imposing argument against its being deemed fraudulent.

The objection is certainly powerful, that its tendency is to delay creditors. If there be a surplus, this surplus is placed, in some degree, out of the reach of those who do not sign the release, and thereby entitle themselves under the deed. The weight of this argument is felt; but the property is not entirely locked up. A court of equity, or courts exercising chancery jurisdiction, will compel the execution of the trust, and decree what may remain to those creditors who have not acceded to the deed. Yet we are far from being

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satisfied that, upon general principles, such a deed ought to be sustained.

But whatever may be the intrinsic weight of this objection, it seems not to have prevailed in Pennsylvania. The construction which the courts of that State have put on the Pennsylvania statute of frauds must be received in the courts of the United States.

In Lippincott and Annesley v. Barker, 2 Binney, 174, this question arose, and was decided, after elaborate argument, in favor of the validity of the deed. This decision was made in 1809, and has, we understand, been considered ever since as settled law.

In Pierpont and Lord v. Graham, 4 Wash. 232, the same question was made, and was decided, by Judge Washington, in favor of the validity of the deed. This decision \* was [ \* 616 ] made in 1816. We are informed of no contrary decision in the State of Pennsylvania, and must consider it as the settled construction of their statute. The validity of the deed cannot now be controverted, no actual fraud being imputed to it.

2. The assignment of the debt due from Brashear to West being valid in equity, has Brashear a right to set off, in equity, against judgments obtained for the use of the assignees in the name of West, his claims against West for the money paid to Anderson, and for the money received on Bush's claim?

The question, whether he might have availed himself of these offsets at law, does not now arise. Can he avail himself of them as plaintiff in equity?

That a *chose in action* is assignable in equity, is not controverted. Equity will protect and enforce the assignment. If subsequent to its being made, and before notice of it, any counter claims be acquired by the debtor, these claims may unquestionably be sustained. But if they be acquired after notice, equity will not sustain them. If it were even true that they might have been offered in evidence, in a suit at law, brought in the name of the assignor, he who has neglected to avail himself of that advantage, cannot, after the judgment, avail himself of such discounts as plaintiff in equity. To deprive a party of the fruits of a judgment at law, it must be against conscience that he should enjoy them. The party complaining must show that he has more equity than the party in whose favor the law has decided. This cannot be done in a case like the present, unless the equity of the debtor accrued before notice of the assignment.

The right to these discounts, then, depends on the fact of notice.

The assignment was made on the 21st of April, 1807. In September; 1808, Brashear became special bail for West, in a suit instituted by George Anderson. The bill alleges that, at the time of

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becoming special bail, Brashear had no notice of the assignment. The answer avers that he had notice.

It is contended in argument, that the fact of notice is not sufficiently proved by the answer. This cannot be admitted. The defendant has a judgment at law, and the plaintiff comes into court to set aside that judgment by his superior equity. He must show that equity.

A circumstance appears in evidence which has some tendency [ \*617 ] to support the answer. In July, 1808, the account was settled between Brashear and West, and the balance acknowledged. This account calculates interest up to the 21st of April, 1808, the day on which the assignment was made; and strikes the balance on that day. The coincidence countenances the belief that the calculation of interest stopped on that day, because the account was then transferred; and increases the probability that West, who acknowledged the account, was informed of the reason.

We think, then, that Brashear, having had notice of the assignment when he became special bail for West, cannot be permitted to set off the money paid on that account against the judgment, unless he was induced to trust West by the conduct of the assignees. Of this, we find no evidence in the record.

The money received by West for Bush's claim is a still later transaction, and is consequently subject to the same rule.

5. The last point to be considered is the claim of Brashear to compensation for the loss of the money attached in the hands of Latimer.

The bill charges that this money would have been paid by Latimer, had he not been restrained by the attachments; that those suits were wilfully or negligently procrastinated by the plaintiffs, whose duty it was to have brought them to a conclusion, and to have obtained the money which ought to have been adjudged to them, before Latimer became insolvent; and further, that the effects attached ought to have been secured by measures which the law authorized, but which were totally omitted.

The answers deny these charges, and aver that the suits were prosecuted with diligence, and every step taken to secure the debts which the law prescribed.

The first impression would be that the creditors who sued out their attachments were desirous of obtaining their money, and would not intentionally interpose obstacles to the accomplishment of their object. It may also be stated with some confidence, that those who sue out process authorized by law, are not responsible for the loss consequent from that process, unless that loss is produced by the improper use made of it. The charges made in the bill and denied in the

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answers, must be \* supported by evidence, or the plaintiff [ \* 618 ] cannot prevail. He relies on the proceedings in the attachment as furnishing this evidence.

The writ sued out by the assignees of Francis West, in his name, was returnable to June term, 1809. The defendant not appearing, judgment was rendered against him at the third term, on the 20th of January, 1810, which was as soon as by the course of the court it was attainable. No further step appears to have been taken in this cause. The court is not satisfied that, had a *scire facias* been sued out against the garnishee, judgment could have been obtained before he became insolvent.

Nixon's executors sued out their attachment in October, 1809, and obtained judgment at the third term by default. A writ of inquiry of damages was awarded in March and executed in June term, 1811, and final judgment rendered for \$8,328.30, the damages assessed by the jury. A *scire facias* was immediately sued out against Latimer, the garnishee, returnable to September court. In the preceding August, Latimer became insolvent.

The only delay with which Nixon's executors can be chargeable is the interval between the rendition of the judgment and the awarding of the writ of inquiry.

Is this delay so culpable as to charge the executors with the loss resulting from the insolvency of Latimer? In pursuing this inquiry, the situation of the parties and of the cause must be taken into view.

When this attachment was sued out, no property on which it could be served was in the hands of the garnishee. The ginseng had been all shipped by Latimer, and the money in his hands had been attached by himself and by the assignees of West, both of which had a right to prior satisfaction. Had they proceeded with as much expedition as the course of the court would admit, to ascertain the amount of their damages, and to sue out upon the judgment for those damages a *scire facias* against the garnishee, there must have been some complexity and delay in ascertaining the amount of the prior claims of the attachments of Latimer and of West's assignees, both of which had priority to theirs. It is not shown that a judgment against the garnishee could have been obtained before he became insolvent. At any rate, there was much reason to \* believe that [ \* 619 ] the affair would be more expeditiously as well as more satisfactorily arranged by the parties themselves.

In November, 1809, Nixon's executors addressed a letter to Walter Brashear, informing him of their attachment, as well as of that issued by West's assignees, and urging him to make provision for the sum which would remain due after exhausting the fund in the hands of

Latimer. The letter concludes with saying: "We think a direction from you to Mr. Latimer to pay over the balance due on your ginseng on the attachments, would save you much interest, as many months must elapse before the law will possess either the assignees or us of our legal claims."

The record shows that the proceedings of the executors were embarrassed by the claims of West's assignees, on account of the surplus due on the notes assigned to John Nixon after payment of his debts. In a letter of the 7th of March, 1810, to the assignees, they say: "Enclosed is our reply of the 28th ultimo to Mr. West's objections to the account of the late Mr. Nixon, as rendered on his assignment. You will oblige us by considering our remarks, and withdrawing all opposition to our attachment on Dr. Brashear's property in the hands of Latimer. You certainly can demand of us a settlement, and we must pay over to you any thing recovered beyond what will satisfy the just demand of Mr. Nixon's estate." The letter referred to is also in the record. It shows that Mr. West made specific objections to their claims.

After judgment against Latimer, the executors consulted counsel, whose opinion was that the garnishee might safely pay the money in his hands into court. The letter communicating this opinion is in the record. Mr. Latimer states the fact in his deposition, but says that his counsel thought differently.

Late in 1810, or early in 1811, Dr. Brashear was in Philadelphia. The executors addressed a letter to him of the 2d of February, in which they say: "We beg leave to call your attention to the following letter, and to state, your funds in Mr. Latimer's hands must lie without interest under the attachment until they are divided, unless you order him to pay over the same in the proportions that are due; first, to Mr. West's assignees, for the balance of your account as settled with Mr. West when in Kentucky; and what remains [ \* 620 ] on the two \* notes in our possession, as stated in our letter of the 4th of November last, together \$7,055.63."

In a letter to Dr. Brashear, after the failure of Latimer, they say: "It was our hope that before your departure for Kentucky an arrangement would have been made by you with Mr. Latimer, which would have enabled us to have received from your effects in his hands the amount of your notes in our possession. In this expectation we were disappointed. Being left to legal remedy under the attachment, judgment has been had, &c."

It appears that Dr. Brashear had full knowledge of the attachments, and might have directed Mr. Latimer to bring the money into court. He was himself in Philadelphia, and might then have arranged the

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business according to his own judgment. He does not appear to have taken any step to facilitate its termination. He might have given special bail, and have released the attached effects. He has not done so.

We think the delay of Nixon's executors to proceed with the execution of the writ of inquiry to assess damages, is accounted for, and that it is by no means certain that, had they proceeded with the utmost dispatch, they could have forced the money out of the hands of the garnishee before his failure. We think that more blame attaches to Dr. Brashear than to the executors, and that the loss is to be ascribed to himself in a greater degree than to them.

The attachment sued out by the assignees of Mr. West, in his name, is attended by different circumstances, and presents a question of more difficulty. The interval between their judgment and the failure of Latimer was nineteen months. Their claim on the fund due from Latimer to Brashear had priority to that of any other creditor. Mr. Brashear states, in his deposition, that a part of the ginseng, more than one third, was in his possession when the attachment for the use of the assignees was served. This ginseng was soon afterwards shipped by himself and another on their own account, and the sale was made with the consent of the assignees.

The act "about attachments" directs that the manner of executing the writ "shall be by the officer's going to the house, or to the person in whose hands or possession the defendant's goods or effects are supposed to be, and then and there declaring, in the presence of one or more credible persons in the \*neighborhood, that [ \* 621 ] he attacheth the same goods or effects. From and after which declaration, the goods, money, or effects, so attached, shall remain in the officer's power, and be by him secured, in order to answer and abide the judgment of the court in that case, unless the garnishee will give security therefor."

The language of the act seems to require that the specific property attached should be taken into possession by the officer, unless the garnishee will give security therefor. At all events, the law provides positively that they shall remain in his power. The reasonable construction of the act would seem to be, that if the officer leaves them in possession of the garnishee without security, he is himself surety for their forthcoming; and in the mean time he retains the power to remove them. The possession of the garnishee must be virtually his possession; and thus that power of the officer over the attached effects which the law requires would be preserved.

Mr. Sergeant, in his Treatise on Attachment, pp. 14, 15, says,

"there can be no difficulty in the service of the writ in this case, where the property is shown to the officer, and is admitted by the person in possession to be the property of the defendant in the attachment as alleged or supposed by the plaintiff. But the garnishee may conceal the alleged property, or contest the ownership, liability, &c. And of these and other circumstances, the officer cannot judge, but they are subsequently to be examined into and decided upon by interrogatories or by evidence on trial." In these cases, the officer would not be bound to take possession or security from the garnishee, unless indemnified by the plaintiff.

In consequence of these and other difficulties, Mr. Sergeant continues : "The usual practice is, where there is a garnishee, merely to serve a copy of the writ of attachment on the person named as garnishee with notice annexed by the officer, that, by virtue of the writ of which that is a copy, he attaches all and singular the goods and chattels of the defendant in his hands or possession, and summons him as garnishee ; in which case the return of the officer is in the same general terms ; leaving the existence, nature, extent, and liability of the property to be developed in the subsequent proceedings by interrogatory or by evidence on the trial.

In the case at bar, the officer proceeded in what Mr. Sergeant [\* 622] says, is the usual manner. The service and the return were general, and the property remained in the possession of the garnishee. Yet there was no concealment of the property, nor contest about the ownership. The difficulties which caused the practice stated by Mr. Sergeant did not arise. We are not informed whether this practice is understood in Pennsylvania to have so far changed the law, that no responsibility is in any case incurred by the officer who leaves the attached effects in the hands of the garnishee without security; nor are we informed whether these effects are supposed to remain in the power of the officer.

They must undoubtedly be to a certain extent in the custody of the law. If, under this modern practice, they are understood to be confided by the law to the garnishee, still, he must keep them safely, and he is not at liberty to change them, to convert them into money, or to exercise any act of ownership over them.

The attachment for the use of the assignees was served in April, 1809, and before the attached effects were shipped to China by the garnishee on account of himself and William Redwood. The assignees, as is stated by the garnishee, consented to the sale. They have then, by their own acts, aided the garnishee in violating the confidence reposed in him by the law, and the duty growing out of that confidence. If the goods were, in legal contemplation, still in

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the power of the officer, they have combined with the garnishee to take them out of his power. By this act a total loss has been produced. By converting this ginseng into a debt due from the garnishee, they have made it his interest, if, in declining circumstances, to interpose obstacles to the regular course of the law, and to delay the proceedings as far as might be in his power. He refused to bring the money into court when urged to do so by Nixon's executors. It is not probable that he would have refused to produce the ginseng. The plaintiff, on the most reasonable presumption, has lost the value of the ginseng which was attached in the name of West for his assignees, by this unjustifiable interference. We think them legally responsible for this loss.

The counsel for West's assignees contend that the testimony of Latimer ought not to be regarded, because, supposing the fact to be as charged in the bill, it is not proved as charged. The \*allegation of the bill is that the attaching creditors "per- [ \*623 ] mitted the whole fund to remain subject to the management of Latimer, even assenting and encouraging its export." Latimer says, "there was not any collusion, agreement, or consent between the executors of Mr. Nixon, or the assignees of Mr. West and myself, that the property or money attached should remain in my hands, should be shipped abroad or should be used or disposed of in any way, other than the consent of the assignees of Mr. West that the ginseng might be sold; which consent was after their attachment and before that by Mr. Nixon's executors.

At a time, then, when the ginseng was placed in the custody of the law, and withheld from the control of Brashear by the attachment of West's assignees, they consented to its being taken out of the custody of the law and sold. The loss of the article, so far as we can judge, is the consequence of this consent. That they did not mention its exportation, in terms, is we think unimportant. The place of sale was not prescribed. The foreign was the ultimate and the best market for the article. An unlimited power to sell, given to a person in the habit of exporting it to China, without mentioning the place of sale, included, and must have been understood to include a power to dispose of it in the usual manner.

The assignees also insist that the accounts furnish cause for believing that the witness is mistaken, in supposing that part of the ginseng was shipped after their attachment was levied.

If any obscurity exists in the testimony, the difficulty may be removed by leaving the fact to be investigated in the circuit court.

The assignees also insist on the fact that Latimer was the agent

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of Brashear for the purpose of selling his ginseng; and must still be considered as his agent in the sale itself. He must, therefore, be understood as selling with the consent of Brashear, as well as with that of the assignees.

But the attachment suspended all power of selling under the authority given by Brashear. To implicate him in this transaction, some actual interference on his part must be shown. None is even alleged. It is not to be presumed; for Latimer could not have paid the proceeds of the ginseng to Brashear while the attachment remained.

The counsel have insisted that the attaching creditors [ \*624 ] could not have taken the property out of the hands of the garnishee. Admitting them to state the law of Pennsylvania correctly, and we cannot doubt it, still, the property was in the custody of the law, and would have remained safely in its custody, so far as we are informed by the testimony, had not the assignees consented to the removal of that protection.

We are of opinion that the plaintiff ought to have been allowed a credit for the amount of the ginseng sold by the garnishee with the consent of the assignees of West, and shipped by Latimer, for himself and Redwood. But that he ought not to have been allowed a credit for the money paid by him as special bail for George Anderson. The decree is to be reversed and the cause remanded to the circuit court, with directions to reform the said decree according to this opinion. The parties to bear their own costs in this court.

The same decree was entered in the case of West and others v. Brashear.

14 P. 51; 8 O. 510.

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**THE HEIRS OF P. F. DUBOURG DE ST. COLOMBE, Appellants, v. THE UNITED STATES.**

7 P. 625.

A decree was reversed, and the case remanded, because a complex account had not been referred to a master. The court would not examine it.

**APPEAL from the district court of the United States for the eastern district of Louisiana.**

*Livingston*, for the appellants.

*Taney*, (attorney-general,) for the United States.

*MARSHALL*, C. J., delivered the opinion of the court.

*Ex parte Madrazzo.* 7 P.

The United States had obtained judgment against P. F. Dubourg de St. Colombe, in his lifetime, for a large sum of money. This judgment was revived after his death; or in the law language of Louisiana, declared executory; and the property of which he died possessed, ordered to be seized and sold to satisfy the demand of the United States.

The heirs of P. F. Dubourg de St. Colombe filed their bill, praying an injunction to stay proceedings at law on this judgment.

The bill alleges that the estate of their parents was held in common at the death of their mother, and that the moiety belonging to their mother descended at her death on them, and was not liable for debts, afterwards contracted by their father. It also alleges that they were infants, and that their father took possession of their estate, which he had wasted to an amount exceeding his effects in their hands. The law of Louisiana, they say, gave them a lien at the death of their mother on all the estate of their father, to the extent of this waste, exempt from the claim of any subsequent creditor.

\* Several witnesses were examined, and several documents [ \* 626 ] filed to prove the amount of the estate, at the death of their mother. The accounts are complex and intricate. The judge examined them, and being of opinion that the estate was insolvent at the death of the mother, dissolved the injunction and decreed costs. This has been understood to be a final decree, and to be equivalent to dismissing the bill. The plaintiffs appealed to this court.

We are of opinion that a complex and intricate account is an unfit subject for examination in court, and ought always to be referred to a commissioner to be examined by him and reported, in order to a final decree. To such report the parties may take any exceptions; and thus bring any question they may think proper before the court. The decree therefore is reversed, and the cause remanded to the court of the United States for the eastern district of Louisiana, with directions to refer the account to a commissioner, with instructions to settle and report the amount of the estate at the death of the wife, in order to a final decree; and to state such matters specially as he may think necessary, or as either party may require.

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*Ex parte JUAN MADRAZZO.*

7 P. 627.

MR. WHITE presented a libel, in the admiralty, against the State of Georgia.

The libel stated in substance that the State was in possession of

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*Ex parte Bradstreet.* 7 P.

certain slaves and of the proceeds of the sales of certain others, in which the plaintiff had an interest, and that these slaves had been brought into the United States after an illegal capture, and had been taken possession of by the State.

[ \* 632 ] \* MARSHALL, C. J., delivered the opinion of the court.

The case is not a case where the property is in custody of a court of admiralty, or brought within its jurisdiction, and in the possession of any private person. It is not, therefore, one for the exercise of that jurisdiction. It is a mere personal suit against a State to recover proceeds in its possession, and in such a case no private person has a right to commence an original suit in this court against a State.

14 H. 103.

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GEORGE W. WARD, AND RICHARD K. CALL, REGISTER AND RECEIVER OF THE UNITED STATES, Appellants, *v.* LEWIS GREGORY. SAME, Appellants, *v.* JACOB ROBINSON AND F. SWEARINGEN.

7 P. 633.

Proceedings by *mandamus* must be brought up by writ of error, not by appeal.

APPEALS from the court of appeals of the territory of Florida, confirming an order of the superior court issuing a writ of *mandamus*.

On motion of Mr. White, the court ordered the appeals to be dismissed, the proceedings being at law, and writ of error the only proper remedy.

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*Ex parte MARTHA BRADSTREET*, in the Matter of MARTHA BRADSTREET, Demandant.

7 P. 634.

When the demand in the declaration is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice of this court, and of the circuit courts, is to allow the value to be given in evidence.

And where the district court of the northern district of New York, having circuit court powers, dismissed certain writs of right because the value of the land demanded was not averred in the declaration, a writ of *mandamus* was awarded, ordering the judge to reinstate all the cases and proceed to try them.

THE judge of the district court of the United States for the northern district of New York, made his return to a rule to show cause why a writ of *mandamus* should not issue, granted at the last term, 6 Pet. 774, and Mr. Beardsley was heard in support of the return, and Mr. Jones, contra. The substance of the return will be found

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*Ex parte Bradstreet.* 7 P.

recited in the writ of *mandamus*; which follows the opinion of the court.

\* MARSHALL, C. J., delivered the opinion of the court. [ \* 647 ]

After hearing counsel, and considering the cause shown by the honorable the judge for the court of the United States for the northern district of New York; this court is of opinion that it ought not to exercise any control over the proceedings of the district court in allowing or refusing to allow amendments in the pleadings; but that every party has a right to the judgment of this court in a suit brought by him in one of the inferior courts of the United States, provided the matter in dispute exceeds the sum or value of \$2,000.

In cases where the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice of this court, and of the courts of the United States, is, to allow the value to be given in evidence. In pursuance of this practice, the defendant in the suits dismissed by order of the judge of the district court, had a right to give the value of the property demanded in evidence, at or before the trial of the cause; and would \* have a right to give it in evi- [ \* 648 ] dence in this court. Consequently, he cannot be legally prevented from bringing his case before this tribunal. The court doth therefore direct that a *mandamus* be awarded to the judge of the court of the United States for the northern district of New York, requiring the said judge to reinstate, and proceed to try and adjudge according to the right of the case, the several writs of right, and the mises thereon joined, lately pending in said court, between Martha Bradstreet, defendant, and Apollos Cooper *et al.* tenants.

The following *mandamus* was issued by order of the court.

United States of America. ss.

To the honorable Alfred Concklin, judge of the district court of the United States for the northern district of New York, greeting:—

Whereas one Martha Bradstreet hath heretofore commenced and prosecuted, in your court, several certain real actions, or writs of right, in your court lately pending, between the said Martha Bradstreet, defendant, and the following named tenants severally and respectively, to wit, Apollos Cooper and others (naming them). And whereas, heretofore, to wit, at a session of the supreme court of the United States, held at Washington on the second Monday of January, in the year 1832, it appeared, upon the complaint of the said Martha Bradstreet, among other things, that at a session of your said court, lately before holden by you, according to law, all and singular the said writs of right then and there pending before your said court,

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*Ex parte Bradstreet. 7 P.*

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upon the several motions of the tenants aforesaid, were dismissed for the reason that there was no averment of the pecuniary value of the lands demanded by the said defendant in the several counts filed and exhibited by the said defendant against the several tenants aforesaid; which orders of your said court, so dismissing the said actions, were against the will and consent of said defendant; whereupon the said supreme court, at the instance of said defendant, granted a rule requiring you to show cause, if any you had, among other things, why a writ of *mandamus* from the said supreme court, should not be awarded and issued to you, commanding you to reinstate and proceed to try and adjudge, according to the law and right

of the case, the several writs of right aforesaid, and the [ \*649 ] mises therein joined. And whereas, at the late session \* of the said supreme court held at Washington on the second Monday of January, in the year 1833, you certified and returned to the said supreme court, together with the said rule that after the mises had been joined in the several causes mentioned in the said rule, motions were made therein, on the part of the tenants, that the same should be dismissed upon the ground that the counts respectively contained no allegation of the value of the matter in dispute, and that it did not therefore appear, by the pleadings, that the causes were within the jurisdiction of the court; that, in conformity with what appeared to have been the uniform language of the national courts upon the question, and your own views of the law, and in accordance especially with several decisions in the circuit court for the third circuit, (see 4 Wash. C. C. Rep. 482, 624,) you granted their motions; and assuming that the causes were rightly dismissed, it follows of course that you ought not to be required to reinstate them, unless leave ought also to be granted to the defendant to amend her counts; and whereas, afterwards, to wit, at the same session of the said supreme court last aforesaid, upon consideration of your said return and of the cause shown by you therein against the said rules being made absolute, and against the awarding and issuing of the said writ of *mandamus*, and upon consideration of the arguments of counsel, as well on your behalf, showing cause as aforesaid, as on behalf of the said defendant, in support of the said rule, it was considered by the said supreme court that you had certified and returned to the said court an insufficient cause for having dismissed the said actions, and against the awarding and issuing of the said writ of *mandamus*, pursuant to the rule aforesaid; the said supreme court being of opinion, and having determined and adjudged upon the matter aforesaid that in cases where the demand is not made for money, and the nature of the action does not require the value of the thing demanded

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*Ex parte Bradstreet. 7 P.*

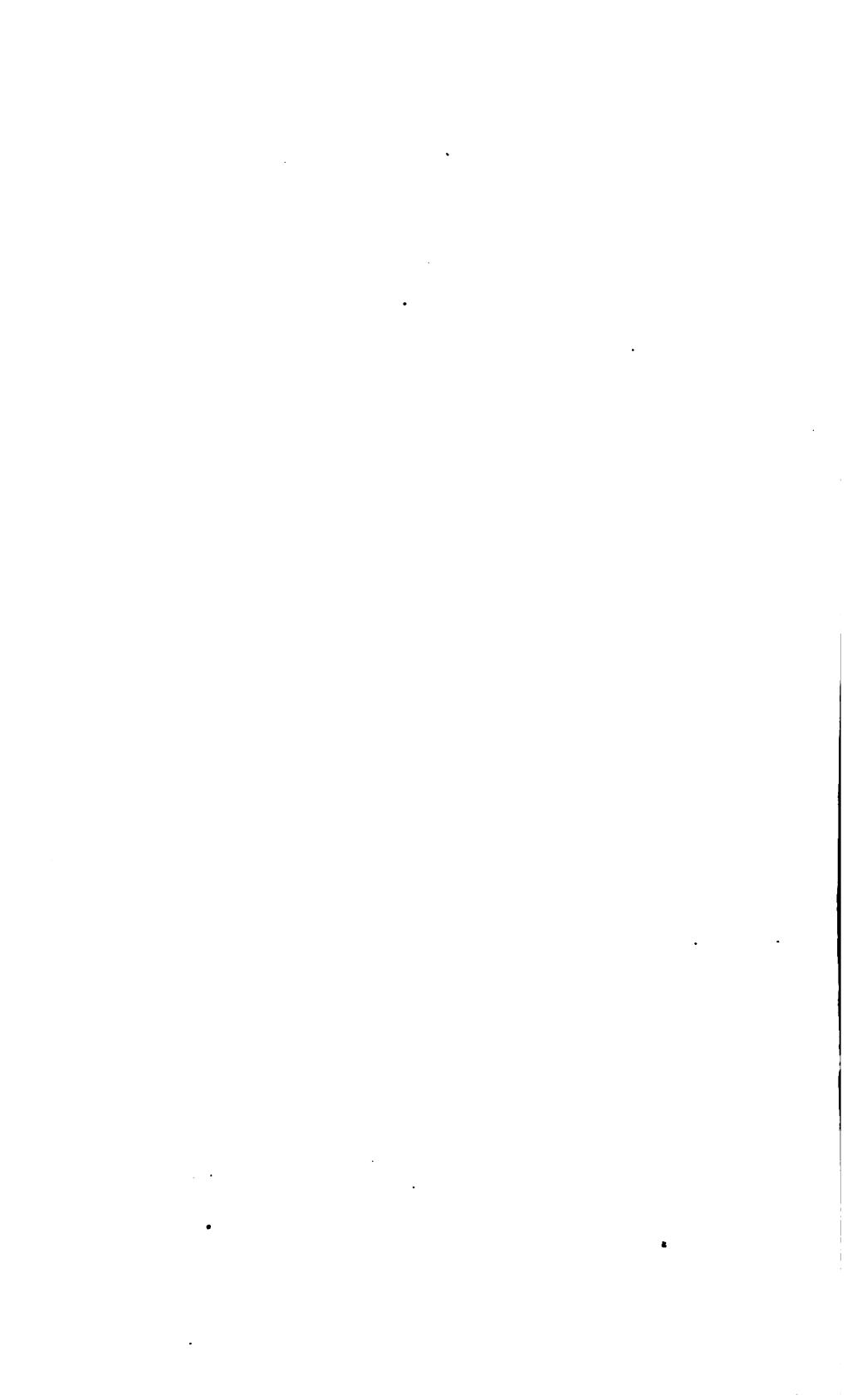
to be stated in the declaration, the practice of the said supreme court, and of the courts of the United States, is to allow the value to be given in evidence; that, in pursuance of this practice, the demandant in the suits dismissed by order of the judge of the district court, had a right to give the value of the property demanded in evidence, either at or before the trial of the cause, and would have a right to give it in evidence \* in the said supreme court; con- [ \* 650 ] sequently that she cannot be legally prevented from bringing her cases before the said supreme court; and it was also then and there considered by the said supreme court that the peremptory writ of the United States issue requiring and commanding you, the said judge of the said district court, to reinstate and proceed to try and adjudge, according to the law and right of the case, the several writs of right and the mises therein joined, lately pending in your said court between the said Martha Bradstreet, defendant, and Apollos Cooper and others, the tenants aforesaid; therefore you are hereby commanded and enjoined that immediately after the receipt of this writ, and without delay, you reinstate and proceed to try and adjudge, according to the law and right of the case, the several writs of right and the mises therein joined, lately pending in your said court between the said Martha Bradstreet, defendant, and the said Apollos Cooper and others, the tenants herein above named, so that complaint be not again made to the said supreme court; and that you certify perfect obedience and due execution of this writ to the said supreme court, to be held on the first Monday in August next. Hereof fail not at your peril, and have then there this writ.

Witness, the honorable John Marshall, chief justice of said supreme court, the second Monday of January, in the year of our Lord 1833.

W. T. CARROL,

Clerk of the supreme court of the United States.

12 P. 59; 14 P. 614; 3 Wal. 478; 6 Wal. 441; 7 Wal. 270, 364; 14 W. 166, 170;  
16 W. 270; 23 W. 508.



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## ACCOUNT.

PRACTICE, 5; SPECIFIC PERFORMANCE, 2.

## ACTION.

1. An action for money lent, or had and received, cannot be maintained on a collateral promise. *Douglass v. Reynolds*, 415.
2. The plaintiffs being British subjects, and resident in England, during the war between the United States and Great Britain, received an order from the defendants firm, under which they purchased goods for the defendant's firm, and advanced the price to the vendors. The goods were not received by the surviving partner of the firm until after the close of the war. *Held*, that an action for goods sold and delivered would not lie against the surviving partner, and that the contract was illegal *Scholefield v. Eichelberger*, 581.

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## AGENT.

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**ANSWER.**  
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**APPEAL.**

1. If a circuit court entertain an appeal from a district court without jurisdiction, this court, on appeal, will reverse the decree of the circuit court. *United States v. Nourse*, 195.
2. No appeal is given to the United States from a decree of a district judge awarding an injunction to stay a warrant of distress from the treasury, either by the act of May 15, 1820, (3 Stats. at Large, 592,) which confers the jurisdiction, or by the act of March 3, 1803, (2 Stats. at Large, 244,) regulating appeals from final judgments and decrees in district courts. *Ib.*
3. The second section of this act of 1803 made no change in the law respecting appeals from district to circuit courts, except by reducing the matter in controversy necessary for an appeal from \$300 to \$50. But it substitutes an appeal for a writ of error, from the circuit to the supreme court, in admiralty, prize, and equity causes. *Ib.*
4. Though seamen join in a libel in the admiralty, the matter in dispute is several with each libellant, and the claimant can appeal only in regard to a separate demand by a seaman exceeding the sum of \$2,000. *Oliver v. Alexander*, 69.
5. Upon a bill in equity to obtain a decree for a sale of a lot of land to satisfy an alleged lien by a deed of trust, the matter in controversy is the amount of the debt, not the value of the land; so that the plaintiff cannot appeal if his debt claimed is below the requisite sum. *Farmers' Bank of Alexandria v. Hooff*, 441.
6. Where the property condemned as forfeited, for an entry under a false denomination, was of greater value than \$2,000, but, if the duties were paid and deducted from the proceeds, less than \$2,000 would remain — *Held*, that the whole value of the property was the amount in dispute, and the claimant had a right to appeal. *United States v. Eighty-four Boxes of Sugar*, 541.
7. Where the record showed that no appeal bond was taken, the appeal was dismissed, on motion. *Boyce v. Grundy*, 375.
8. Under the act of March 3, 1803, (2 Stats. at Large, 244,) an appeal, prayed after the expiration of the term, must be proceeded with like a writ of error. *Yeaton v. Lenox*, 157.
9. Where some of the defendants, who were united in interest under a decree, did not join in an appeal, nor appear to have had notice and to have refused to join, the appeal was dismissed. *Owings v. Kincannon*, 520.
10. The record stating generally that an appeal was claimed and allowed, and the appeal bond, reciting that only two out of six defendants claimed and were to prosecute the appeal, the court considered this as explaining the general entry, and the appeal was dismissed. *Ib.*

**COURTS OF THE UNITED STATES, 12; MANDAMUS, 3.**

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**PRACTICE, 2.**

**ASSIGNMENT.****COURTS OF THE UNITED STATES, 1; FRAUDULENT CONVEYANCE; RENT;  
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**BAIL.**  
**DEBT, 2.**

## BANK OF THE UNITED STATES.

1. Under the charter of the Bank of the United States, a person who attempts to utter as true a false bill, purporting to be of that bank, and to be signed by the president and cashier thereof, is liable to indictment, although the persons whose signatures are forged were not president and cashier of that bank. *United States v. Turner*, 427.
2. A draft drawn by the president of a branch of the Bank of United States on the principal bank, is not a bill, within the clauses of its charter which provide for the offences concerning forged bills. *United States v. Brewster*, 440.

## BILLS OF EXCHANGE, &amp;c. 5.

## BILL OF REVIEW.

JUDGMENT, 5-8.

## BILL OF REVIVOR.

EVIDENCE, 18.

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Notice to an indorser, left with a fellow-boarder at a private boarding-house, where the indorser lodged, he being absent, is sufficient. *The Bank of the United States v. Hatch*, 104.
2. A contract by the holder with the drawer of a bill, for a valuable consideration, to continue an action against the latter, founded on the bill, to the next term, discharges the indorser. *Ib.*
3. An indorser is not a competent witness to prove that when a prior indorser put his name on the note he did so under a representation that sufficient bank stock, to secure payment of the note, had been pledged by the maker, and that his liability would be merely nominal. *Bank of the United States v. Dunn*, 20.
4. Nor can oral evidence, to that effect, be allowed to control the contract of the indorser. *Ib.*
5. Nor had the president and cashier of a branch of the Bank of the United States authority to bind that bank by such a representation. *Ib.*

## CONSTITUTION OF THE UNITED STATES, 1; DEBT, 1; LAW AND FACT; PAYMENT; USURY.

## BOND.

1. If a bond, drawn to be executed by two sureties, be signed by only one, and by him be delivered as an escrow, to operate as his deed when the other shall have signed and delivered it, he is not bound until such signature and delivery by the other surety,—*aliter*, if the first who signs delivers it as his deed. *Duncan's Heirs v. United States*, 535.
2. An official bond of a paymaster, executed at New Orleans, is governed by the common law. *Ib.*
3. A paymaster gave a bond to secure the faithful performance of his duty within a certain district; he was a defaulter; the presumption is, that his defalcation arose out of transactions within his district, though it appears he made some payments out of the district. *Ib.*

## BURDEN OF PROOF.

Though the burden of proof is in many cases on the party who has peculiar means of

knowledge, the rule is not universal, and the circumstances of this case afford an exception. *Greenleaf's Lessee v. Birth*, 126.

**REVENUE LAWS, 4.**

**CAPIAS AD SATISFACIENDUM.**

**COURTS OF THE UNITED STATES, 12. 18.**

**CHEROKEE NATION.**

**CONSTITUTIONAL LAW, 1.**

**CITATION.**

**WRIT OF ERROR, 6.**

**COLLECTOR.**

**FORFEITURE.**

**CONDITION.**

**PUBLIC LANDS, 16. 18.**

**CONSTITUTIONAL LAW.**

1. The law of Georgia, which subjected to punishment all white persons residing within the limits of the Cherokee nation, and authorized their arrest within those limits, and their forcible removal therefrom, and their trial in a court of the State, was repugnant to the constitution, treaties, and laws of the United States, and so void; and a judgment against the plaintiff in error, under color of that law, was reversed by this court, under the 25th section of the Judiciary Act, (1 Stats. at Large, 85.) *Worcester v. Georgia*, 214.
2. The provision in the 5th amendment of the constitution, declaring that private property shall not be taken for public use without just compensation, is only a limitation of the power of the United States; it is not applicable to the legislation of the several States. *Barron v. City of Baltimore*, 464.
3. The ultimate opinion delivered by Mr. Justice Johnson, in the case of *Ogden v. Saunders*, 12 Wheat. 258, was concurred in and adopted by the three judges who were in the minority on the general question, and has settled the law involved therein. *Boyle v. Zacharie*, 142, 291.

**JUDGMENT, &c. 6. 7; STATE; STATUTES.**

**CONTRACT.**

**ACTION, 2; LIEN.**

**COSTS.**

**JUDGMENT, &c. 4.**

**COUNTERFEITING.**

**BANK OF THE UNITED STATES.**

**COURTS OF THE UNITED STATES.**

1. The payee of a note, at its date, was a citizen of the same State as the maker; subsequently, he became a citizen of another State, and then indorsed the note to a citizen of the latter State. *Held*, that the indorsee might sustain an action in the circuit court in his own name, the case not being within the exception in the 11th section of the Judiciary Act, (1 Stats. at Large, 78.) *Kirkman v. Hamilton*, 8.

2. An averment that the defendant is a naturalized citizen of the United States, and resides in Louisiana, and the plaintiff is a citizen of France, is sufficient to give jurisdiction to a circuit court. *Gassies v. Ballon*, 366.
  3. On a writ of error to a state court, the record of which was understood to show that the character of consul-general of the king of Saxony did not exempt the defendant from being sued in the state court, the judgment was reversed. *Davis v. Packard*, 486.
  4. This is not a mere personal privilege. It is a privilege of the foreign sovereign, that his representative shall be sued only in the courts of the United States, with which government alone he has relations; and it is not waived by an omission to plead it to the action. *Ib.*
  5. The plaintiff in error sued out of the court of errors of New York, a writ of error to the supreme court of that State, and assigned as an error in fact, that he was consul-general in the United States for the king of Saxony; the defendants in error answered that this did not appear by the record of the supreme court; the court of errors affirmed the judgment of the supreme court; on a writ of error from this court under the 25th section of the Judiciary Act, (1 Stats. at Large, 85,) — *Held*, First, That this court can notice nothing which took place in the state court unless it appears on the record. *Davis v. Packard*, 17.
  6. Second, That it is sufficient if it appears an act of congress was applicable to the case, and was misconstrued against the plaintiff's claim. *Ib.*
  7. Third, That this did appear, and this court had jurisdiction. *Ib.*
  8. This court has not jurisdiction under the act of April 29, 1802, § 6, (2 Stats. at Large, 159,) upon a certificate of division respecting the marshal's poundage on an execution. *Bank of the United States v. Green*, 11.
  9. The construction of a statute of limitations of Tennessee being well settled by a series of decisions of the highest court of that State, differently from what was understood by this court when it made a former decision, and subsequently thereto, that decision was overruled, and the rule fixed by the state court was adopted. *Green v. Neal's Lessee*, 119.
  10. When the demand in the declaration is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice of this court, and of the circuit courts, is to allow the value to be given in evidence. *Ex parte Bradstreet*, 604.
  11. And where the district court of the northern district of New York, having circuit court powers, dismissed certain writs of right because the value of the land demanded was not averred in the declaration, a writ of *mandamus* was awarded, ordering the judge to reinstate all the cases and proceed to try them. *Ib.*
  12. The circuit court of the District of Columbia having awarded a *ca. sa.* to collect a fine, and the defendant being in custody under that process, this court has jurisdiction to award a writ of *habeas corpus* to inquire into the legality of the imprisonment under this process, it being a case of appellate jurisdiction. *Ex parte Watkins*, 569.
  13. The prisoner not having been brought into court on the return term, and being held solely under the *ca. sa.* his imprisonment was illegal. *Ib.*
- ALIEN; APPEAL; EQUITY, 1; FORFEITURE, 1; NONSUIT; PUBLIC LANDS, 2; STATE.**

**COVENANT.****RENT, 1.****CRIMES AGAINST THE UNITED STATES.**

The 8d section of the act of congress entitled "An act more effectually to provide for  
**VOL X.**"

the punishment of certain crimes against the United States, and for other purposes," passed March 3, 1825, (4 Stats. at Large, 115,) adopted only the laws of the several States in force at the time of its enactment. *United States v. Paul*, 68.

## DEATH.

## PUBLIC LANDS, 4.

## DEBT.

- Under the laws of North Carolina, adopted by Tennessee, an action of debt by an indorsee, will lie on a promissory note, and such an action of debt was not barred by any statute of limitations of Tennessee. *Kirkman v. Hamilton*, 8.
- Debt on a recognizance of bail, is an original action, and need not be brought in the court in which the judgment was rendered. *Davis v. Packard*, 486.

## DECREE.

## JUDGMENT, &amp;c.

## DEDICATION.

- If the owner of a tract of land dedicate it to the public use as an open square of a city, for the convenience and accommodation of the inhabitants, the public acquire a vested right to its possession for that use, and the owner or his representatives cannot maintain an action of ejectment to recover possession of it. *City of Cincinnati v. White's Lessee*, 179.
- To constitute such a dedication the legal title need not pass from its owner, nor is it necessary that any grantee of the use should be in existence; all that is required is the assent of the owner of the land to the use, and the actual enjoyment of the use, for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment. *Ib.*
- Though land is not in a condition to be presently used as a street, and has never been so used; yet, if capable of being so used, it may have been dedicated. *Barclay v. Howell's Lessee*, 202.
- Where a part of a strip of land adjoining a river had been used as a way, and the residue was not in a condition to be so used without grading, &c., and the public authorities had from time to time improved more and more of it, and the proprietors had made no claim for thirty years, and their agent declared, when the town was laid out, that it was reserved for a street. *Held*, that the jury would be warranted in finding a dedication of the whole strip, and if so dedicated the proprietor could not recover. *Ib.*
- Declarations of an agent employed to lay out a town, and return a plan afterwards acted on by his principal, made while engaged in the work, to the effect that a certain strip of ground was reserved for a street, are admissible to prove a dedication of the land to that use. *Ib.*
- Though non-user is important evidence upon the question of dedication, it is not conclusive. *Ib.*

## DEED.

- In New Jersey, the omission to record a deed of real estate, avoids it only as against creditors and purchasers of the grantor. *Magniac v. Thompson*, 513.
- In Kentucky, a deed not acknowledged or recorded, passes the title as against all the world except creditors of the grantor, and purchasers from him without notice. *Sillard's Lessee v. Davis*. *Same v. Cecil*, 59.

8. In Maryland, a deed not enrolled, is a nullity; and conveyances by an insolvent to his assignee are not an exception to the general rule. *Greenleaf's Lessee v. Birth*, 126.
4. In a deed by which the grantor "doth grant, except as is hereinafter excepted," the exception is not out of a thing previously granted; but being incorporated into the granting clause itself, the thing excepted is not granted; and, therefore, there is no exception of a thing certain out of a thing certain granted. *Ib.*
5. An exception of all squares and lots conveyed, or sold, or agreed to be conveyed, prior to a day named, by three persons, or either of them, is not void for uncertainty. *Ib.*
6. A deed called for a lot designated on a town plat as No. 183, bounded by a street and a river. *Held*, that if the jury were satisfied that the call for a river was a mistake, it might be rejected. *Barclay v. Howell's Lessee*, 202.
7. What circumstances may be sufficient presumptive proof of the execution and delivery of a lost deed. *Sicard's Lessee v. Davis*. *Sane v. Cecil*, 59.
8. The probate of a deed by a witness before a magistrate, is entitled to more weight than mere evidence of the handwriting of a subscribing witness. *Crane v. Morris's Lessee*, 274.
9. Questions as to the probate and registration of a deed, under the North Carolina act of 1715. *Ross v. M'Lung*, 118.

**ESTOPPEL; EXCHANGE; PUBLIC LANDS, 10.**

**DEFAULT.**

**MANDAMUS, 1.**

**DEMURRER.**

**PRACTICE, 2.**

**DESCENT AND DISTRIBUTION.**

- n New York, a citizen cannot inherit collaterally from another citizen, when the former must make his pedigree through mediate alien ancestors. *Levy's Lessee v. M'Cartee*, 47.

**DEVISE AND LEGACY.**

Bequest to the testator's wife of all his personal estate, "to and for her own use, benefit, and disposal, absolutely; the remainder of the said estate, after her decease, to be for the use of the said Jessie Goodwin," the son of the testator — *Held*, the bequest to the son cut down the interest of the wife to a life-estate, and the son took a vested remainder. *Smith v. Bell*, 29.

**DISCLAIMER.**

**PARTIES, 2**

**DISTRICT OF COLUMBIA.**

**COURTS OF THE UNITED STATES, 12. 18.**

**DUTIES.**

**FORFEITURE; REVENUE LAWS.**

**EJECTMENT.**

- 1 In an action of ejectment for a tract of land, described in the declaration by metes and bounds, the jury may find a verdict for the plaintiff as to part of the tract, and

- for the defendant as to the residue ; and if they do so, the judgment should conform to the verdict. It is error for the court to order a general verdict and judgment for the whole land, upon such a finding. *M'Arthur v. Porter*, 89.
2. A general description of a lot, as lying between a certain street and river, is sufficient in ejectment. *Barclay v. Howell's Lessee*, 202.
  3. A tenant is estopped to deny his landlord's title, but if the plaintiff in ejectment himself deny the validity or operation of his contract, he cannot use it to create a tenancy, and thus estop the defendant. *Hughes v. Clarksville*, 148.

**DEDICATION, 1 ; LIMITATIONS, &c. 5.**

#### ENTRY.

**PUBLIC LANDS, 4-11.**

#### EQUITY.

1. The chancery jurisdiction of the courts of the United States is the same in all the States, and the rule of decision is the same in all. Its remedies are not regulated by the state practice. *Boyle v. Zacharie*, 297.
2. A court of chancery, having jurisdiction over the person who has the legal title to lands in another State, may, by a decree, force him to convey to the holder of the equitable title, for whom he stands as a trustee ; but it cannot, by its decree, or through a deed of a commissioner, pass that title. *Watts v. Waddle*, 164.
3. The protection extended by a court of equity to a *bond fide* purchaser, belongs only to the purchaser of the legal title without notice of an outstanding equity. He who purchases no legal title cannot have this protection. *Valtier v. Hinde*, 469.

**JUDGMENT, &c. 8 ; LIMITATIONS, &c. 2-9 ; PUBLIC LANDS, 16.**

#### ESTOPPEL.

A recital of a lease in a deed of release operates as an estoppel, which works on the interest in the land; and binds not only the parties, but privies in blood, in estate and in law. *Crane v. Morris's Lessee*, 274.

**EJECTMENT, 8.**

#### EVIDENCE.

1. There are many facts, particularly geographical, the knowledge whereof is derivable from other sources than parol proof, which the court may judicially notice. *Peyroux v. Howard*, 506.
2. Historical facts of general and public notoriety may be proved by reputation, and that reputation may be established by historical works, of known character and accuracy. But evidence of this sort is confined in a great measure to ancient facts which do not presuppose better evidence in existence ; and where, from the nature of the transaction, or the remoteness of the period, or the public and general reception of the facts, a just foundation is laid for general confidence. *Morris v. Harmer's Heirs*, 558.
3. The work of a living author, who is within the reach of the process of the court, can hardly be deemed of this nature. He may be called as a witness. *Ib.*
4. The plat of the lots in the city of Cincinnati, made under the authority of the owner of the site of the city, and which had been generally recognized and used in the surveys of the lots laid down in the same, was properly admitted as evidence of reputation. *Ib.*
5. Ancient boundaries and landmarks may be proved by reputation. *Boardman v. Reed's Lessees*, 185.
6. In a writ of capias, by which an action was commenced, the two defendants were

- described as merchants, and surviving partners of a firm; in the first count of the declaration, a promise by them, as surviving partners, was alleged; in the second count, the promise declared on was by "the said defendants;" — *Held*, that evidence of a promise, made after the death of the deceased partner, was admissible under the second count. *Schimmelpennick v. Turner*, 1.
7. A treasury transcript is admissible in evidence for a surety to prove the date of a payment credited in the account. *Cox v. United States*, 83.
  8. The board of commissioners of the navy hospital fund not being required by any act of congress to record its proceedings, oral evidence of its acts is admissible. *United States v. Fillebrown*, 386.
  9. Though, where it is not possible from lapse of time to offer evidence of handwriting, by a witness who had seen the party write, a comparison of handwriting of the document to be proved with other writings known to be his, may be heard, yet generally it is not to be allowed. *Strother v. Lucas*, 367.
  10. Where an original deed should have been in the possession of the plaintiff's grantor, and he was applied to and furnished a bundle of papers which he said were all he had relating to the lands, and the deed in question was not found in the bundle, and there were no circumstances of suspicion, — *Held*, that it was not necessary to produce the grantor as a witness to prove the loss of the deed, that due diligence had been used to obtain it, and secondary evidence was admissible. *Minor v. Tillotson*, 407.
  11. On trial of an indictment for violating the act of April 20, 1818, (3 Stats. at Large, 447,) by issuing a commission to cruise against a foreign prince at peace with the United States, secondary evidence of the existence and contents of the commission is admissible, according to the usual rules of evidence. *United States v. Reyburn*, 143.
  12. Evidence having been given that the commission was on board of the vessel engaged in a cruise, and in the possession of J. C., her commander, — against whom several bench warrants having been issued, returns of *non est* were made, — *Held*, that secondary evidence was thus rendered competent. *Ib.*
  13. It was not necessary to apply to the foreign government for a copy of the commission. *Ib.*
  14. *Prima facie* evidence of a fact is such as, in judgment of law, is sufficient to establish the fact; in the absence of all controlling or discrediting evidence, it is conclusive, and the jury are bound so to regard it. If they refuse to do so, the court should set aside their verdict. *Kelly v. Jackson*, 286.
  15. When *prima facie* or presumptive proof has been made, its character, as such, ought not to be disregarded, and the court has not a right to direct the jury to view it otherwise than in the aspect in which it is presented. *Crane v. Morris's Lessee*, 274.
  16. Private laws of a State, and proceedings by its legislature in respect to the sale of estates of deceased persons, must be proved as facts, and not by certificates of the secretary of state, certifying generally to the fact that such laws exist, and such proceedings have been had, without giving transcripts thereof. *Leland v. Wilkinson*, 133.
  17. It is not error to exclude legal evidence of an isolated fact from which a jury would not be warranted in drawing any inference pertinent to the issue. *Boardman v. Reed's Lessees*, 135.
  18. When a suit has been revived by a bill of revivor, the evidence which had been taken is used as if no abatement had occurred. *Vattier v. Hinde*, 469.
  19. The reversal of a decree does not annul an agreement of the parties as to the admission of evidence. *Ib.*

**BILLS OF EXCHANGE, &c. 4; BURDEN OF PROOF; COURTS OF THE UNITED STATES, 10. 11; DEDICATION, 4. 6; DEED, 7-9; EXCEPTIONS, 2-4; GUARANTEE, 5; PRACTICE, 4; PUBLIC LANDS, 19.**

#### EXCEPTIONS.

1. The court is not bound to repeat to the jury the same substantial proposition of law in different forms; it is sufficient if it be once laid down in an intelligible and unexceptionable manner. *Kelly v. Jackson*, 286.
2. If evidence be objected to generally, when admissible, for any purpose, it is not error to overrule the objection and admit the evidence; the party objecting should, in such a case, pray an instruction limiting the effect of the evidence to the specific purpose for which it is admissible. *Ib.*
3. A court is not bound to give an instruction concerning a hypothetical state of facts, as to which there is no evidence before the jury. *Boardman v. Reed's Lessees*, 135.
4. It is not error for a judge to decline to advise a jury concerning the relative weight of different parts of the evidence. *Crane v. Morris's Lessee*, 274.

#### EXCHANGE.

A parol exchange of lands in Ohio, is not valid. *Morris v. Harmer's Heirs*, 558

#### EXECUTION.

1. In modern times, courts of law exercise a summary jurisdiction, upon motion, over executions, and quash them, without putting a party to his writ of *audita querela*; but these motions are addressed to the sound discretion of the court, and their refusal is not a ground for a writ of error. *Boyle v. Zacharie*, 297.
2. Though the forms and modes of proceeding under writs of execution in the State have been adopted by congress, they are not controlled by collateral restrictions which the State has imposed on its courts, and, though an injunction, by a state law, may operate as a *supersedeas*, this does not govern executions from the courts of the United States. *Ib.*
3. At common law, a *supersedeas* must come before a levy, otherwise the sheriff may sell on a *venditioni*. *Ib.*
4. Though, after the reversal of an erroneous judgment, the defendant has a right to recover back what he may have paid, by a writ of restitution, or *scire facias*, or an action at law against the creditor, yet what is done under the execution pursuant to its precept, is valid, and, so far as strangers or third persons are concerned, is final. *Bank of the United States v. Bank of Washington*, 3.
5. An execution, having regularly issued on an erroneous judgment, was sent by one of the judgment creditors to the plaintiffs in error, to be collected for his account, with an indorsement thereon: "Use and benefit of the office of discount and deposit, U. S., Washington city, C. Neale." The plaintiffs in error received the amount, and when it was paid, the defendants in the judgment informed the agent of the plaintiffs in error they intended to appeal to the supreme court, and should expect the plaintiffs in error to refund. The judgment having been reversed. — *Held*, the plaintiffs in error were not liable for the money thus collected. *Ib.*
6. Under the law of Tennessee, land having been attached on mesne process and judgment rendered by default, and the property condemned, and a *venditioni* issued, the division of the county, which left part of the land in the old, and part in the new county, did not prevent a sale of the whole, under the *venditioni*. *Tyrell's Heirs v. Rountree*, 545.

**FINE.****COURTS OF THE UNITED STATES, 12. 13.****FOREIGN ATTACHMENT.****TRUSTEE PROCESS.****FORFEITURE.**

1. The circuit court, having pronounced a decree of condemnation in a case of seizure, has jurisdiction of an application by a collector to award to him his share of the proceeds; it is an incident to the possession of the principal cause. *M'Lane v. United States*, 174.
2. The collector's right to a distributive share of a forfeiture is inchoate, and may be released by the government, until the proceeds are actually received for distribution; but whatever is reserved out of the forfeiture, is reserved as well for the seizing officer, as for the government. *Ib.*
3. This principle applied to the reservation of double duties, on the release of certain cargoes under a special act of congress. *Ib.*

**REVENUE LAWS, 3. 4.****FORGERY.****BANK OF THE UNITED STATES.****FRAUDS, STATUTE OF.****EXCHANGE.****FRAUDULENT CONVEYANCE**

1. An assignment by a debtor of all his property for the benefit of his creditors, is not presumptively fraudulent. *Brashear v. West*, 589.
2. In Pennsylvania, such an assignment is not made void by a clause which excludes all from its benefit who do not release the debtor within ninety days. *Ib.*

**HUSBAND AND WIFE.****GEORGIA.****CONSTITUTIONAL LAW, 1.****GRANT.****PUBLIC LANDS, 13. 14. 16. 18. 19. 21. 22.****GUARANTEE.**

1. A letter stating that "our friend, C. H., to assist him in business, may require your aid from time to time, either by acceptance or indorsement of his paper, or advances in cash. In order to save you from harm in doing so, we do hereby bind ourselves, severally and jointly, to be responsible to you at any time, for a sum not exceeding \$8,000, should the said C. H. fail so to do," is a continuing guarantee. *Douglass v. Reynolds*, 415.
2. The words of a guarantee are to be taken as strongly against a guarantor as their sense will admit. *Ib.*
3. A party giving a guarantee is entitled to know whether it is accepted within a reasonable time after its acceptance. *Ib.*

**INDEX.**

4. Under a continuing guarantee, notice need not be given to the guarantor of each credit given, or liability incurred; but, when the transactions under the guarantee are all closed, notice should be given, within a reasonable time, of the amount for which the guarantors are held responsible; and also, within a reasonable time, demand should be made on the debtor, and notice of his default given to the guarantor. *Douglass v. Reynolds*, 415.
5. In an action upon a guarantee, the plaintiff may show that he relied and acted on it in making advances, or giving credit. *Ib.*

**HABEAS CORPUS.****COURTS OF THE UNITED STATES, 12. 13.****HUSBAND AND WIFE.**

1. To render an antenuptial settlement void, as a fraud on creditors, both parties must concur in or have cognizance of the fraud; they must coöperate in the original design, at the time of its concoction, or carry it into effect with notice that it is fraudulent. *Magniac v. Thompson*, 518.
2. Marriage is a consideration of the greatest value, in contemplation of law, to support such a settlement. *Ib.*
3. By a valid antenuptial settlement, the wife becomes a creditor of the husband, and after marriage he may prefer that debt. *Ib.*

**IMPRISONMENT.****ACTION; COURTS OF THE UNITED STATES, 12. 13.****INDIAN NATION.****UNITED STATES, 2.****INDICTMENT.****ROBBING, &c.****INJUNCTION.****EXECUTION, &c. 2.****INQUISITION.****MANDAMUS, 1.****INSOLVENT.**

Under the insolvent law of Louisiana, a creditor is entitled to personal notice, and if not given, the proceedings, as to him, are not binding. *Breedlove v. Nicolet*, 527.

**CONSTITUTIONAL LAW, 3; DEED, 3; UNITED STATES.****JOINT DEFENDANTS.****APPEAL, 1. 9. 10; WRIT OF ERROR, 1.****JUDGMENT AND DECREE.**

1. If the record shows two pleas, and an issue and verdict for defendant on one, and no issue on the other, a judgment for the defendant is not erroneous. *Dufau v. Couprey's Heirs*, 82.

2. The demand in a petition being only \$15,000, a judgment for \$20,000 is erroneous. *Cox v. United States*, 88.
- 3 A clause in a judgment, "subject to the legal operation of the defendant's discharge under the insolvent laws of Maryland," does not operate as an admission by the plaintiffs of their validity, or give to them, by consent, any effect. *Boyle v. Zacharie*, 291.
4. If a deed is void at law, upon its face, and a bill to have it cancelled is dismissed, the decree ought to show that the court finds no equitable circumstances to induce it to interfere, and should not give costs. *Peirsoll v. Elliott*, 42.
5. Under the act of May 8, 1830, (4 Stats. at Large, 399,) authorizing the superior court of the territory of Arkansas to entertain a bill of review, to revise certain decrees — *Held*, 1. That the original decree, being made in a suit in which the sole complainant was a fictitious person, was a mere nullity. *Sampeyreac v. United States*, 458.
6. 2. That the act giving the new remedy by bill of review, was constitutional. *Ib.*
7. 3. That congress had power to mould this remedy and dispense with technical rules concerning bills of review. *Ib.*
8. 4. That, as the original complainant was fictitious, a forged deed in that name gave no title, and the purchaser, from the grantee in that deed, acquired no title which a court of equity could protect. *Ib.*

**EJECTMENT**, 1; **EXECUTION**, 4. 5; **MANDAMUS**, 2; **PROCHEIN AMY**; **PUBLIC LANDS**, 17; **WRIT OF ERROR**, 10.

#### JURISDICTION.

**PUBLIC LANDS**, 22.

#### KENTUCKY.

**DEED**, 2; **PUBLIC LANDS**, 8-11.

#### LANDLORD AND TENANT.

**EJECTMENT**, 8.

#### LAW AND FACT.

Whether certain declarations by the indorser of a note amounted to a waiver of demand on the maker and notice to the defendant, or to a new promise in consideration of forbearance, are questions of fact for the jury, under instructions from the court, not mere questions of law. *Union Bank of Georgetown v. Magruder*, 491.

#### LEASE.

#### RENT.

#### LEX LOCI.

1. Though an official bond of a navy agent was, in fact, executed at New Orleans, it was a contract to be executed at Washington, and the liability of its parties must be governed by the rules of the common law. *Cox v. United States*, 83.
2. A contract of suretyship, entered into by consignees at New Orleans, to procure the release of a vessel consigned to them and attached for a debt of the consignor, who resided at Baltimore, and the implied obligation of the consignor to indemnify them, are Louisiana contracts, and are not governed by the law of Maryland. *Boyle v. Zacharie*, 291.

**BOND**, 2. 8.

## LIEN.

An express contract does not waive a lien unless it contains stipulations from which a waiver of the lien may fairly be inferred. *Peyroux v. Howard*, 506.

## ADMIRALTY; SHIPS, &amp;c.

## LIMITATIONS OF ACTIONS.

1. So long as the government held the title to the land demanded, there could be no adverse possession, to cause the statute of limitations to run. *Lindsey v. Miller*, 304.
2. In equity, as well as at law, a statute of limitations is a bar, where the conflicting titles are adverse in their origin, and one was equitable and the other legal. *Miller's Heirs and Devisees v. M'Intyre*, 24.
3. If new parties are made by amending a bill in equity, the statute of limitations does not cease to run in their favor until they are thus made parties. *Ib.*
4. If an amended bill sets up a new title, the statute of limitations runs against that title, till the filing of the amended bill. *Holmes v. Trout*, 442.
5. If a party amend his declaration in ejectment by inserting a new count, laying a demise from a different lessor, the statute of limitations, as against this new title, continues to run till the amendment is made. And if the adverse possession had then been held more than twenty-years, and more than ten years since the death of the plaintiff's ancestor, it is a bar. *Sicard's Lessee v. Davis*; *Same v. Cecil*, 59.
6. To come within the exception in the statute of limitations concerning merchants' accounts, an action on the case must be founded on an account between merchants, which concerns the trade of merchandise. *Spring v. Gray's Executors*, 74.
7. A contract of charter-party on half profits, though both parties are merchants, is not within this exception. *Ib.*
8. Proof that the promisor of a note, which had been discounted at the bank, was heard to say to a third person who congratulated him on being free from debt, "yes, except one d—d \$500 in the Bank of Columbia, which I can pay at any time," and that this note was the only one of his then in the bank, does not amount to a new promise, nor to enough to cause one to be implied, and does not remove the bar of the statute of limitations. *Moore v. Bank of Columbia*, 38.

## LOST INSTRUMENT.

## DEED, 7; EVIDENCE, 10.

## LOUISIANA.

## INSOLVENT; PARTNERSHIP; PUBLIC LANDS, 12.

## MANDAMUS.

1. An application to a district court, to set aside a default and inquisition, is to the discretion of that court, and its refusal is not a proper subject of a writ of *mandamus*. *Ex parte Roberts*; *Ex parte Adshead*, 93.
2. Rule to show cause why a *mandamus* should not issue was granted, where it was sworn that the judge had neglected or refused to enter a judgment. *Ex parte Bradstreet*, 373.
3. Proceedings by *mandamus* must be brought up by writ of error, not by appeal. *Ward v. Gregory*; *Same v. Robinson*, 604.

## COURTS OF THE UNITED STATES, 11; PLEADING, 2. 3.

**MARSHAL.****COURTS OF THE UNITED STATES, 8.****MISDEMEANOR.****ROBBING, &c. 2.****MISNOMER.**

Misnomer of one of the plaintiffs cannot be alleged after judgment. *Breedlove v. Nicolet*, 527.

**NEUTRALITY LAWS.**

1. Under the 3d section of the act of April 20, 1818, (3 Stats. at Large, 448,) it is not necessary that the vessel should be armed, or in a condition to commit hostilities, on leaving the United States, in order to convict one indicted for being concerned in fitting out a vessel with intent that she should be employed, &c. It is sufficient if the defendant was knowingly concerned in fitting out or arming the vessel, with intent, &c., though that intent should appear to have been defeated after the vessel sailed. *United States v. Quincy*, 189.
2. But if the defendant had no fixed intention when the vessel sailed to employ her as a privateer, but only a wish so to employ her if he could obtain funds, on her arrival at a foreign port, for the purpose of arming her, then he is not guilty. *Ib.*

**EVIDENCE, 11-13.****NEW JERSEY.****DEED, 1.****NEW TRIAL.****PRACTICE, 1.****NEW YORK.****DESCENT AND DISTRIBUTION.****NOLLE PROSEQUI.****WRIT OF ERROR, 5.****NON INTERCOURSE.****FORFEITURE.****NONSUIT.**

A circuit court has no authority to order a peremptory nonsuit against the will of the plaintiff. *Crane v. Morris's Lessee*, 274.

**NORTH CAROLINA.****DEBT, 1; DEED, 9.****NOTICE.****BILLS OF EXCHANGE, &c. 1; GUARANTEE, 4; INSOLVENT****OHIO.****EXCHANGE; PUBLIC LANDS, 4.**

## PARDON.

A pardon is a private though official act of the executive, must be delivered to and accepted by the criminal, and cannot be noticed by the court unless it is brought before it judicially by plea, motion, or otherwise. *United States v. Wilson*, 435.

## PARTIES.

1. Though the complainant may be obliged to join a party who is within the jurisdiction in order to a final decree, yet if his joinder would defeat the jurisdiction, and the decree can be so framed as not to affect his interest, he may be stricken out, and the suit may proceed against the other defendants *Vattier v. Hinde*, 469.
2. A disclaimer on the record, by a party whose name is stricken out to sustain the jurisdiction, will be noticed by the court so far as to learn from it what his interest is. *Ib.*

## LIMITATIONS, &amp;c. 8.

## PARTNERSHIP.

By the law of Louisiana, the contract of a mercantile firm creates an obligation *in solido*, and two of the partners may be sued thereon, if the third is out of the jurisdiction. *Breedlove v. Nicolet*, 527.

## EVIDENCE, 6.

## PATENT.

1. The laws passed to secure to inventors an exclusive right to their inventions, ought to be construed in the spirit in which they were made, *Grant v. Raymond*, 94.
2. Under the patent act of 1793, February 21, (1 Stats. at Large, 318,) the secretary of state had power to receive a surrender of a patent, cancel the record thereof, and issue a new patent for the unexpired portion of the term, when the defect in the specification arose from mistake, without fraud or misconduct of the patentee. *Ib.*
3. Though under the 6th section of the act of 1793, a judgment avoiding the patent cannot be entered unless the concealment or addition shall appear to have been made for the purpose of deceiving the public, yet no action will lie if the specification is defective under the 3d section. *Ib.*
4. An alien patentee made an invention in England, and came to this country in 1817; his invention was fraudulently disclosed in England, and went into public use there, and also in France, in 1820; the patentee knew of this use, but neglected to apply for a patent until 1822; the court below instructed the jury that the patentee had slept too long on his rights to be entitled to the benefit of a patent under the act of April 17, 1800, (2 Stats. at Large, 37.) *Held*, this instruction was correct. *Shaw v. Cooper*, 495.
5. If a patent was surrendered for a defective specification, before any act of congress on the subject, the rights of the patentee must be tested by the law as it stood when the original patent was issued. *Ib.*
6. Whatever may be the intention of the inventor if he suffer his invention to go into public use, by any means whatsoever, without an immediate assertion of his right, he is not entitled to a patent. *Ib.*

## PUBLIC LANDS, 1-8.

## PAYMASTER.

## BOND, 2 3

## PAYMENT.

A creditor receiving notes of a third person as a conditional payment, is bound to use due diligence to collect them, and his laches will render the payment absolute. *Douglass v. Reynolds*, 415.

## PENNSYLVANIA.

## FRAUDULENT CONVEYANCE, 2; STATUTES.

## PLEADING.

- 1 Under the 65th section of the collection act of March 2, 1799, (1 Stats. at Large, 677,) though the party is interdicted from an imparlance, or any other means or contrivances for mere delay, he is not shut out from any defence upon the merits; he may plead a tender. *Ex parte Davenport*, 802.
2. The allowance of double pleading is not a matter of absolute right, and a writ of *mandamus* will not be issued, to compel an inferior court to permit more than one plea to be filed. *Ib.*
3. Though a writ of *mandamus* was refused, the court expressed an opinion on the question of law which gave occasion for the application. *Ib.*
4. The court cannot act on a title stated only in a special replication, filed without leave of court. *Vattier v. Hinde*, 469.
5. A plea that all the promisees are not joined, filed after the trial was begun, by leave of court, may be stricken out by its subsequent order. *Breedlove v. Nicolet*, 527.
6. An averment that the plaintiffs are aliens, not traversed, is confessed. *Ib.*

## EJECTMENT, 2; MISNOMER.

## POWER.

To the due execution of a power, a recital of, or even an express reference to it, is not necessary; the intent to execute it is matter *in pais*, to be collected from all the circumstances. *Crane v. Morris's Lessee*, 274.

## PRACTICE.

1. Though this court does not regulate the discretion of the court below as to granting a new trial, yet where a case came up on a certificate of division of opinion whether a new trial should be granted, and the division was upon the same points raised by bills of exception taken at the trial and contained in the record, the court allowed the argument to proceed, reserving its judgment until a writ of error was sued out. *Grant v. Raymond*, 94.
2. An order that a party "appear and answer," before a day certain, is complied with by filing a demurrer. *New Jersey v. New York*, 184.
3. A case not being properly prepared in the circuit court for a hearing, a material fact of domicile of an alleged testator, and also the existence and contents of another supposed will, not being put in issue, the decree was reversed, and the cause remanded, with liberty to the plaintiff to amend his bill. *Estho v. Lear*, 426.
4. A court may change its practice without written rules; and where the question is whether it has done so, its own solemn adjudication is the best evidence. *Duncan's Heirs v. United States*, 535.
5. A decree was reversed, and the case remanded, because a complex account had not been referred to a master. The court would not examine it. *Dubourg de St. Colombé's Heirs v. United States*, 602.

APPEAL, 7-10; COURTS OF THE UNITED STATES, 10. 11; PLEADING, 4. 5; WRIT OF ERROR, 1. 4. 7.

## PROCHEIN AMY.

A prochein amy cannot accept a release not conformable to the decree. *Morris v. Harmer's Heirs' Lessee*, 558.

## PUBLIC LANDS.

1. A patent is a complete appropriation of the land it describes; and at law, no defect in the preliminary steps can be tried. *Stringer's Lessee v. Young*, 3 Pet. 320, confirmed. *Boardman v. Reed's Lessees*, 135.
2. The entire description in a patent must be reasonably construed, to ascertain the identity of the land. *Ib.*
3. If a call is erroneous and repugnant, and enough remains, after rejecting it, to identify the land, the patent is not void. *Ib.*
4. An entry of land made in the name of a person who was dead at the time of the entry, is a nullity in the State of Ohio. *M'Donald's Heirs v. Smalley*, 109.
5. The act of March 2, 1807, (2 Stats. at Large, 424,) was intended to cure defects in entries and surveys, which had occurred without fraud, in the pursuit of a valid title, but not to give validity to a title under a Virginia land warrant, not within the reservation made by that State in the act of cession of lands northwest of the Ohio. *Lindsey v. Miller's Lessee*, 304.
6. The act of March 2, 1807, (2 Stats. at Large, 424,) to cure defects, &c., in entries and surveys, &c., extends to every case which comes within the reservation made by Virginia in her act of cession; and a warrant which in fact was issued in virtue of a resolution of the general assembly of that State, before the act of cession, for military services in the continental line, is within the act of cession, though it does not purport on its face to be issued by virtue of such resolution, and though the term of service was not as great as was required by the standing law of the State for such grants at the time the resolution was passed. *Wallace v. Parker*, 311.
7. Construction of certain acts of assembly of Virginia concerning lands northwest of the Ohio River, namely; the act of 1783, ceding the lands to the United States, another act of 1783, for surveying and apportioning the lands granted to the Illinois regiment, and an act of 1790, an amendment thereof; an act of 1790, for surveying and locating lands granted to George Rogers Clark and others. *Hughes v. Clarksville*, 148.
8. Construction of certain entries and surveys in Kentucky. *Holmes v. Trout*, 442.
9. A call for a survey, which had not acquired notoriety, will not of itself support an entry; but if the survey called for has been made conformably to a valid entry, such a call may be good. *Ib.*
10. In Kentucky, the cancellation of a deed after its delivery, does not revest the title in the grantor. *Ib.*
11. Surplus land does not vitiate a survey, in Kentucky. *Ib.*
12. Under the acts of March 2, 1805, (2 Stats. at Large, 824,) and March 3, 1807, (3 Stats. at Large, 440,) relative to land titles in Louisiana, a confirmation by commissioners does not necessarily enure to the benefit of the holder of the true French or Spanish title. And where the French owner twice conveyed, and possession went with the junior title, and its holder presented his claim, and it was confirmed, and the holder of the elder title wholly omitted to do any act under the laws of congress, it was held, that he was entitled to no benefit therefrom. *Strother v. Lucas*, 367.
13. Under the act of May 23, 1828, (4 Stats. at Large, 284,) concerning private land claims in Florida, the acts of public officers of Spain, in making a grant of land, were presumed to be done by legitimate authority, and to be valid in the absence of fraud. *United States v. Arredondo*, 315.
14. By the 8th article of the treaty between the United States and Spain, of February

- 22, 1819, (8 Stats. at Large, 252,) the lands theretofore completely granted by the king were excepted out of the grant to the United States. The original of that treaty, in the Spanish language, not corresponding precisely with the original in English, the language of the former is to be taken as expressing the intent of the grantor as to the lands granted and reserved. *United States v. Arredondo*, 315.
15. The words "in possession of the lands," in the 8th article of the treaty, do not require actual occupancy; they are satisfied by that constructive possession which is attributed by the law to legal ownership. *Ib.*
16. A condition to settle two hundred families on the land granted, was held to be a condition subsequent, and that, in equity, the change of jurisdiction and circumstances had excused its performance. *Ib.*
17. An inquisition having been taken under the Spanish authorities, by which it was found that the Indians had previously abandoned the lands granted, this was held to be *res judicata*. *Ib.*
18. As respects performance of the conditions of a grant by a private grantee, the date of a treaty is the time of its final ratification. *Ib.*
19. A paper writing, making a grant by a royal officer of Spain, in Florida, addressed to a public officer whose duty it was to keep the original and issue a copy, need not be produced; the copy issued by the proper officer is an original. *United States v. Percheman*, 398.
20. Under the act of May 26, 1830, (4 Stats. at Large, 405,) concerning land claims in Florida, the district court had jurisdiction of a claim rejected by the commissioners; such a rejection not being final action thereon within the meaning of that act. *Ib.*
21. Under the 8th article of the treaty between the United States and Spain, of February 22, 1819, (7 Stats. at Large, 252,) the title to lands which had been granted by the king of Spain, was confirmed by force of the instrument itself. *Ib.*
22. Though a presumption arises from the grant itself that the officer had authority to make it, the court proceeded to examine the proceedings, it being alleged they were void on their face. *Ib.*
23. The objection that the petitioner has conveyed the land to a third person is not to be inquired into. *Ib.*

## RECORD.

APPEAL, 8. 9. 10; COURTS OF THE UNITED STATES, 5.

## REGISTRATION.

DEED, 1-8. 9.

## RELEASE.

PROCHEIN AMY.

## REMAINDER.

DEVISE, &amp;c.

## RENT.

- The personal representatives of the lessee are liable on his covenant to pay rent, though he assigned the lease in his lifetime. *Scott v. Lunt's Administrator*, 584.
- A fee-farm rent is an estate of inheritance, and the assignee may sue for it in his own name, though the reversion, or the right of reentry, were not assigned to him *Ib.*

## REVENUE LAWS.

1. A consignment of a homeward cargo being "to order," the plaintiffs, who were indorsees of the bills of lading, had a right to enter the goods, under the 36th and 62d sections of the Collection Act, of March 2, 1799, (1 Stats. at Large, 627.) *Conard v. Pacific Insurance Company of New York*, 110.
2. The importer has such a right of possession as a general owner, that, after he has duly offered to enter the goods and pay the duties, he may maintain an action of trespass for a wrongful taking thereof. *Ib.*
3. Under the 84th section of the Collection Act of March 2, 1799, (1 Stats. at Large, 694,) a forfeiture may be incurred by entering for drawback, under a false denomination, sugars not previously imported and subjected to duty. *Barlow v. United States*, 522.
4. If entered by a false denomination, the burden of proof is upon the claimant to show that it was by mistake or accident, and a mistake of law is not sufficient. *Ib.*
5. Though among sugar-refiners, sugars, which have not undergone the process of claying, may be spoken of as refined sugar, yet, if this term, among buyers and sellers in this country generally, is applied only to lump and loaf sugar, the term in the acts of congress must be construed to include only those articles. *Ib.*

**APPEAL, 6 ; FORFEITURE ; PLEADING, 1-3.**

## ROBBING THE MAIL.

A person being indicted under the 24th section of the act of March 3, 1825, (4 Stats. at Large, 109,) concerning the post-office department. *Held*, 1. That it was necessary to aver in the indictment that the offence of robbing the mail was committed. 2. That an allegation that the defendant "did procure, advise, and assist J. S. to secrete, embezzle, and destroy a letter, &c.," amounted to an averment that the offence was committed by J. S. 3. That being an indictment for a misdemeanor, it was sufficient, in this case, to describe the offence in the words of the statute. *United States v. Mills*, 430.

## SALE.

**EQUITY, 2 ; EXECUTION ; STATUTES.**

## SEISIN AND DISSEISIN.

A possession under a junior patent, which interferes with a senior patent, the lands being wholly unoccupied by any one claiming under the latter, extends by construction to the whole tract. *Sicard's Lessee v. Davis*. *Same v. Cecil*, 59.

## SET-OFF.

1. The courts may allow to a clerk in a department, by way of offset, an equitable claim, for services rendered to the government under the orders of the head of the department, though there be no act of congress providing for the case, and an auditor of the treasury could not allow the claim. (5 Stats. at Large, 849, § 3; 510, § 2.) *United States v. Macdaniel*, 376.
2. For extra services performed by a military officer under the sanction of the government under circumstances of peculiar emergency, the courts may allow a reasonable compensation by way of off-set. (5 Stats. at Large, 849, § 3; 510, § 2.) *United States v. Ripley*, 382.
3. A person appointed secretary of the board of commissioners of the navy hospital fund, to execute "such duties as may be required of him by the board," for a stated salary, and who performs other services at the request of the board, with the under-

standing that he is to be paid therefor such a commission as has been usually paid for similar services, is entitled to a credit, according to that understanding by way of off-set in an action against him by the United States. (5 Stats. at Large, 349, § 3; 510, § 2.) *United States v. Fillebrown*, 386.

## SHIPS AND SHIPPING.

Giving a credit beyond the time when a vessel may be expected to sail, is a waiver of a lien under a local law, which provides that the lien shall cease if the vessel be allowed to depart without asserting it. *Peyroux v. Howard*, 506.

## ADMIRALTY; LIEN.

## SPAIN.

## PUBLIC LANDS, 12-23.

## SPECIFIC PERFORMANCE.

1. A court of equity will not force a doubtful title on a purchaser; and in this case such defects were found as precluded the vendor from having a decree of specific performance by the vendee. *Watts v. Waddle*, 164.
2. Where the vendee is shown by the bill to have been in possession, and specific performance is refused, under the prayer for general relief, a decree for an account of rents and profits may be made against the vendee; and this court reversed the decree of the circuit court in order to direct such an account, though the claim for it was not made in the circuit court. *Ib.*

## STATE.

Where a libel, in the admiralty, against the State of Georgia, stated in substance that the State was in possession of certain slaves and of the proceeds of the sales of certain others, in which the plaintiff had an interest, and that these slaves had been brought into the United States after an illegal capture, and had been taken possession of by the State; it was held that the libel could not be sustained. *Ex parte Madrazzo*, 603.

## CONSTITUTIONAL LAW, 2; COURTS OF THE UNITED STATES, 9; CRIMES AGAINST THE UNITED STATES; EXECUTION, 2.

## STATUTES.

The State of Pennsylvania, having liens upon lands of its debtor, by judgments and other proceedings, but there being no mode, under the existing law, of procuring payment out of the lands, passed a special act subjecting enough of the lands to sale, on process to be issued by the governor, to satisfy the debts. Held, that this law was not in conflict with the constitution of the United States, or with that of Pennsylvania. *Livingston's Lessee v. Moore*, 546.

## EVIDENCE, 16.

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## SUGARS.

## REVENUE LAWS, 3-6.

## SURETY.

## BOND; EVIDENCE, 2.

## TENDER.

## PLEADING, 1.

## TENNESSEE.

## DEBT, 1; EXECUTION.

## TREASURY TRANSCRIPT.

## EVIDENCE, 7.

## TREATY.

PUBLIC LANDS, 13-23.

## TRESPASS.

REVENUE LAWS, 2.

## TRUSTEE PROCESS.

If a party who sues out a process of attachment consents that the garnishee may sell the merchandise in his hands, he becomes responsible to the debtor for any loss arising therefrom. *Brashear v. West*, 589.

## UNITED STATES.

1. Under the act of March 3, 1797, (1 Stats. at Large, 512,) which is not controlled by the act of March 2, 1799, § 65, (1 Stats. at Large, 676,) the priority of the United States in case of a general assignment by their debtor, comprehends a bond for duties executed before the assignment, but payable afterwards. *United States v. State Bank of North Carolina*, 12.
2. The relations between the Indian tribes and the United States examined. *Worcester v. Georgia*, 214.

APPEAL, 2. 3; CRIMES, &amp;c.; SET-OFF, 1-3.

## USURY.

If a note valid in its inception, and on which the payee could have an action against the maker, be sold by the indorser at a greater rate of discount than 6 per cent. per annum, the indorsee may maintain an action against the indorser; whether he can recover more than the consideration paid was not decided. *Nichols v. Pearson*, 410.

## VERDICT.

EJECTMENT, 1.

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PUBLIC LANDS, 5-7.

## WAY.

DEDICATION, 3. 4.

## WITNESS.

BILLS OF EXCHANGE, &amp;c. 3.

## WRIT OF ERROR.

1. A joint and several judgment having been rendered in Louisiana, the defendants severally sued out writs of error; a motion to dismiss the writs upon the ground that all the defendants ought to have joined in one writ, was overruled. *Cox v. United States*, 83.
2. If more than the sum requisite for a writ of error is claimed in the *ad damnum*, and there is a general verdict for the defendant, the plaintiff may have a writ of error, though the bill of exceptions relates to items of less amount than such requisite sum. *United States v. M'Daniel*, 291.
3. The *ad damnum* in the writ being \$1,000, and the claim in the declaration \$1,241, on a writ of error by the plaintiff below, the *ad damnum* fixed the amount in dis-

pute, and the court cannot take notice that by data in the declaration a computation may be made which would show less than \$1,000 to be due. *Scott v. Lunf's Administrator*, 142.

4. A return to a writ of error from this court to a state court, certified by the clerk of the court which pronounced the judgment, and to which the writ is addressed, and authenticated by the seal of the court, is in conformity to law, and brings the record regularly before this court. *Worcester v. Georgia*, 214.
5. A *nol. pros.* having been entered in the circuit court, a writ of error thereto was dismissed on motion of the attorney-general. *United States v. Phillips*, 375.
6. The 22d section of the Judiciary Act (1 Stats. at Large, 84,) requires a citation signed by a judge, and served at least thirty days before the return day of the writ of error. *Yeaton v. Lenox*, 457.
7. If the defendant in error fail to move to docket and dismiss a cause, until after the record has been filed, the writ of error will not be dismissed. *Pickell's Heirs v. Legerwood*, 438.
8. A writ of error, *coram nobis*, enables a court to correct errors which preceded its judgment. *Ib.*
9. It is now generally disused; a summary proceeding upon motion and affidavits, where they are necessary, being substituted. *Ib.*
10. A writ of error from this court does not lie to examine a judgment rendered on a writ of error, *coram nobis*, where the error alleged was in granting an amendment. *Ib.*

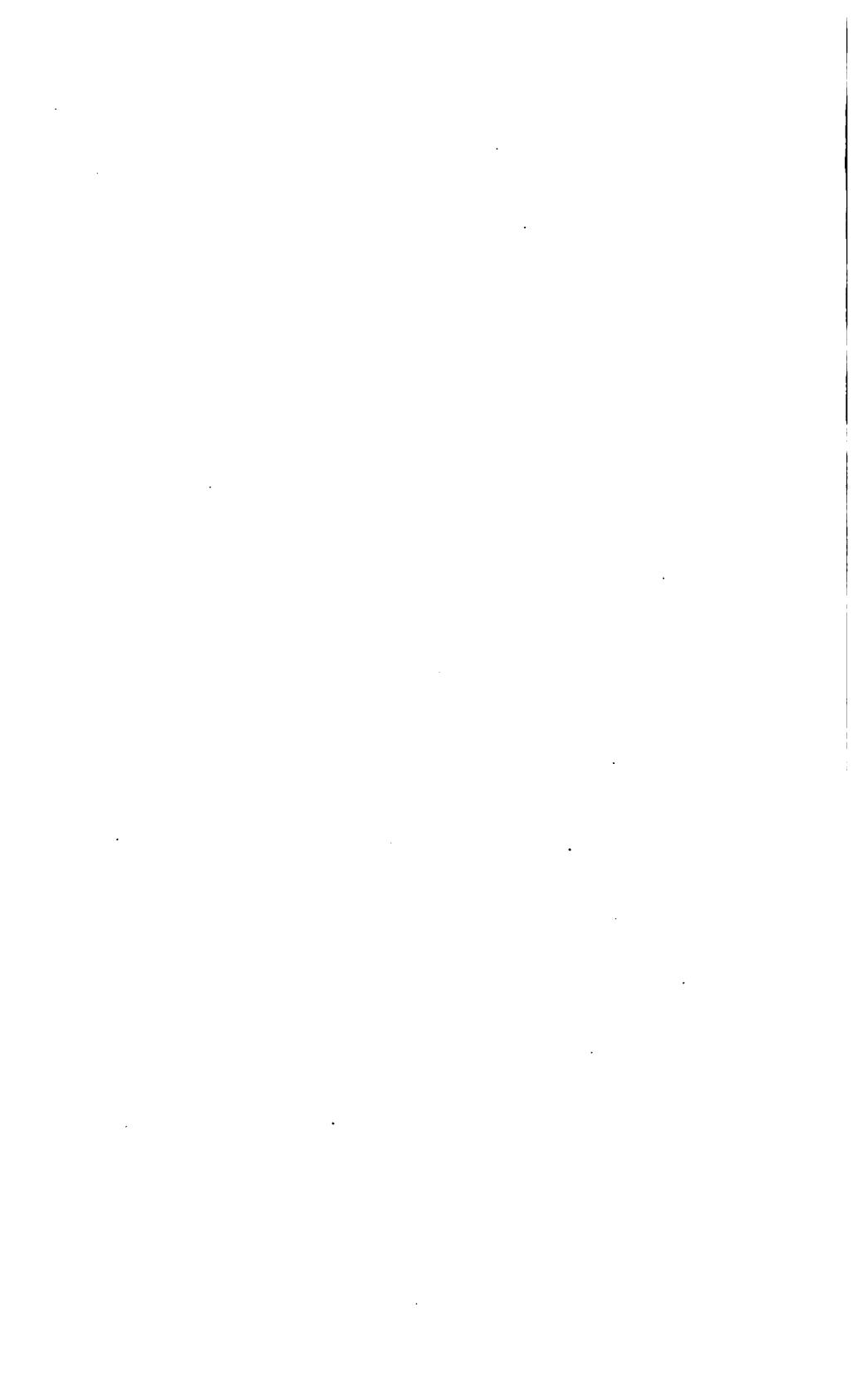
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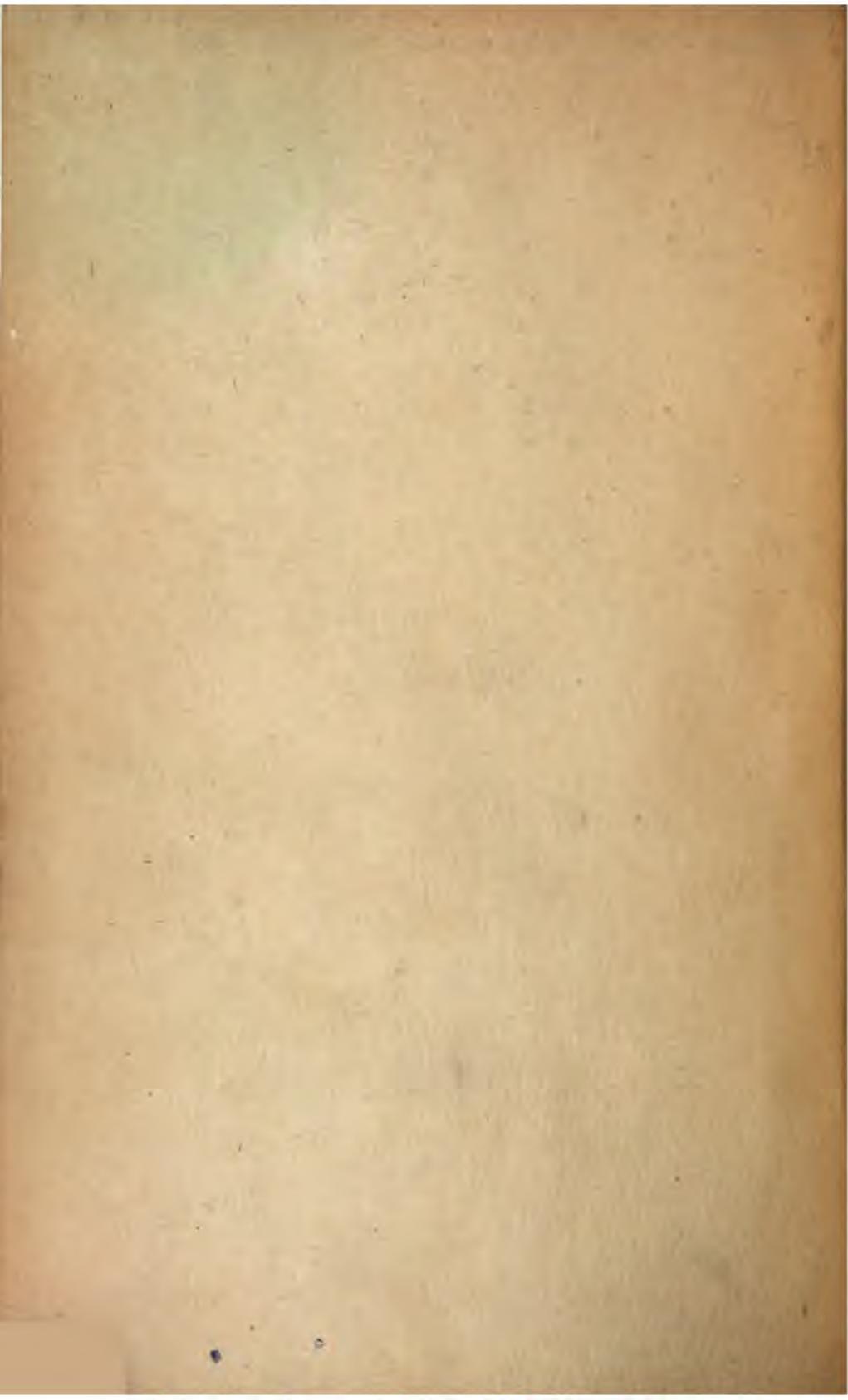
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